IN THE

Supreme Court of the United States

TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH; and JOHN SINCLAIR, LAWRENCE "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE DEFENDANT-RESPONDENTS

ARTHUR KINOY
Rutgers University
School of Law
180 University Avenue
Newark, New Jersey

WILLIAM J. BENDER
Rutgers University
School of Law
Constitutional Litigation Clinic
103 Washington Street
Newark, New Jersey

WILLIAM KUNSTLER
Center for Constitutional Rights
588 Ninth Avenue
New York, New York

HUGH M. DAVIS, JR.
715 Grand Boulevard
Detroit, Michigan

LEONARD I. WEINGLASS
108 Washington Street
Newark, New Jersey

Attorneys for Defendant-Respondents

Of Counsel on the Brief:

ARTHUR KINOY
Rutgers University
School of Law
180 University Avenue
Newark, New Jersey

WILLIAM J. BENDER
Rutgers University
School of Law
Constitutional Litigation Clinic
103 Washington Street
Newark, New Jersey

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 33-85) is reported at 444 F.2d 651 (6 Cir. 1971) and the District Court opinion (App. 23-32) is reported at 321 F. Supp. 1074 (E.D. Mich. 1971).

JURISDICTION

The Defendant-Respondents accept the statement of the Government as to the Jurisdiction of this Court.

QUESTIONS PRESENTED

1. Whether the warrantless and general electronic surveillance involved in this case, which was authorized by the Attorney General on the basis of his sole judgement that the surveillance was "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government" violated the Fourth Amendment to the Constitution?

2. Whether the warrantless and general electronic surveillance involved in this case, which was authorized by the Attorney General on the basis of his sole judgement that the surveillance was "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government" violated the First Amendment to the Constitution?

3. Whether the Executive's claim of power to engage in a program of warrantless and general electronic surveillance of citizens and domestic organizations considered in its sole discretion as being involved in attempts "to attack and subvert the existing structure of the government" violates the First and Fourth Amendments to the Constitution and the fundamental principle of separation of powers?

4. Whether this Court should retreat as the Government suggests from its constitutional holding in *Alderman v. United States* that conversations overheard by illegal surveillance to which defendants have standing to object must be disclosed for the purpose of an adversary hearing on relevance?

5. Whether appellate review by way of mandamus in the Court of Appeals was appropriate at this stage of the proceeding?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory materials are set forth in Appendix B to this Brief.

STATEMENT OF THE CASE*

This case arises out of a criminal prosecution in the United States District Court for the Eastern District of Michigan. The three defendants therein, John Sinclair, Lawrence ("Pun") Plamondon, and John Forrest are charged with conspiracy to destroy government property in violation of 18 U.S.C. § 371, and defendant Plamondon alone with destruction of government property in violation of 18 U.S.C. § 1361. They were indicted on December 7, 1969, and they pleaded not guilty.

Prior to trial, on October 5, 1970 the defendants filed a motion, *inter alia*, to compel disclosure of electronic surveillance. App. 8-9. The Government replied by filing with the District Court, logs of intercepted conversations of defendant Plamondon, together with an affidavit of Attorney General John Mitchell stating that the conversations had been overheard through "wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the Government." The Affidavit stated that he had expressly authorized the installation of the devices. App. 20-21. The Attorney General further claimed that disclosure of the logs "would prejudice the national interest." *Id.*

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*Counsel for defendant-respondents wish to express their gratitude for the invaluable assistance they have received from Linda Huber, University of Washington, School of Law, 1971; Dr. John Anthony Scott, Professor of Legal History, Rutgers University, School of Law; Paul Acinapura, Paul Casteleiro, Robert Golcheski, Donna Lieberman, Mark Manewitz and Jim Yates, student members of the Constitutional Litigation Clinic of the Rutgers University, School of Law; Arthur Kahn and Carmela Ackman, students in the Constitutional Litigation Seminar of the Rutgers University, School of Law; Deena Atlas, Patricia Fuentes, Mary Hanlon, Paul Schachter, Brenda Smith, Elizabeth Urbanowicz, Penny Yates, legal workers and staff of the Rutgers University, School of Law.

The Government argued that the surveillances in question, although not authorized by a prior judicial warrant, were nevertheless rendered lawful by the authorization of the Attorney General. The Government stated:

> There can be no question that the President must and will engage in intelligence gathering operations which he believes are necessary to protect the security of the nation. Government's Memorandum Relating to Electronic Surveillance, p. 4.

The Government thus characterized the issue before Judge Keith as one concerning the inherent power of the President.[1]

Although the Government conceded that the issue before the Court ". . . involves the legality only of those electronic surveillances deemed necessary to gather intelligence information to protect the nation from internal attack and subversion, *Id.* at 6, it argued that the reasons for the legality, which it assumed, of warrantless foreign intelligence surveillance would apply by analogy to the domestic area as well. *Id.* at 6. The Government stated that the decision to conduct such surveillance was entirely a matter of Executive concern thus "courts should not question the decision of the Executive Department." *Id.* at 7. The Government explained that the judgment to engage in investigative surveillance rested upon "a wide variety of considerations," such as the "purpose of a subversive organization" and the "possible danger" it presents, which can only be evaluated properly by the Executive. *Id.* at 9.

The Government further requested that if the Court ordered disclosure, that it first notify the Government so that the Attorney General could determine how to proceed. *Id.* at 10.

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[1] "[T]he question presented here is whether in exercising his inherent power as Chief Executive Officer of the United States the President may, without violating the Fourth Amendment, authorize the employment of wiretapping to gather intelligence information." *Id.* at 5.

Judge Keith rejected the Government's arguments and held that the warrantless surveillance was unlawful, adopting the rule and rationale of Judge Warren E. Ferguson in *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971). As to the supposed "inherent power" of the President, Judge Keith stated: "The Court cannot accept this proposition for we are a country of laws and not of men." App. 27.

The Judge called attention to the broader significance of the Government's claims beyond the case before him.

> The contention by the Government that in cases involving "national security" a warrantless search is not an illegal one, must be cautiously approached and analyzed. We are, after all, dealing not with the rights of one solitary defendant, but rather, we are here concerned with the possible infringement of a fundamental freedom guaranteed to all American citizens. App. 28.

The Judge affirmed that the Attorney General was indeed bound by the warrant requirement, by which a court makes "an objective determination whether or not probable cause of some criminal activity exists, which activity would make the searching reasonable and not in violation of Fourth Amendment rights." App. 30. He noted that the Attorney General's Affidavit would have been insufficient basis for issuance of a search warrant, since no allegations were made of probable cause of some criminal activity, but that if such probable cause had existed a search warrant could have been readily obtained. App. 31-32. He concluded that the Attorney General's claims were without foundation.

> Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. App. 32.

The Court held the surveillance to be illegal and on January 25, 1971, it ordered that the Government make full disclosure to the defendant of his monitored conversations so a hearing on taint could take place. App. 32.

The Government proceeded to file with the Sixth Circuit Court of Appeals a Petition for a Writ of Mandamus to command Judge Keith to vacate his order of disclosure.

The Government once again described its claim before the Court of Appeals as based on the inherent powers of the President:[2]

The Government again made clear, as it had in the District Court, that the case involved wholly domestic considerations:

> As indicated earlier, the surveillances involved in this case were authorized not to gather "foreign intelligence" information nor to gather information relating to attempts of a foreign power to overthrow our government, but to gather information which the President, acting through the Attorney General, had determined was necessary to protect the national security against the threat posed by individuals and groups within the United States. Id. at 17.

It argued that a judicial warrant ought not to be required because complicated factors, "not all of a factual nature," make the judgment to conduct electronic surveillance appropriate solely to the Executive. Government's Supplemental Memorandum for the Petitioner, p. 17-18.

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[2] "The specific question raised by this case is whether, in exercising his inherent power, as Chief Executive, to protect the nation's security, the President may, without violating the Fourth Amendment, authorize the employment of wiretapping to gather intelligence information without securing a prior warrant."

Government's Memorandum in Support of Petition for a Writ of Mandamus, p. 8.

The Government explained the nature and source of the power claimed for the President:

> The President, in his dual role of Commander-in-Chief of the Armed Forces and Chief Executive, possesses another serious power and responsibility, that of safeguarding the security of the nation against those who would subvert the Government by unlawful means. This power is the historical power of the sovereign to preserve itself. *Id.* at 3.

The Court of Appeals for the Sixth Circuit ruled that the "great issues at stake" justified review on the merits by Mandamus.

It denied the Government's petition and affirmed the District Court's order of disclosure of the illegal surveillance.

The Court of Appeals set forth its responsibility in deciding the case:

> It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and one of the greatest Chief Justices of the United States. App. 57.

The Court held that there was no basis in law for the Executive's claim of inherent power to conduct warrantless surveillance.

> The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand. It is clear to us that Congress in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* (Supp. V, 1965-69), refrained from attempting to convey to the President any power which he did not already possess.
>
> Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and we shall not repeat its holding here. App. 59.

The Court further stated that the Executive's claim of inherent power violated historical constitutional principles of restraints on government and separation of powers:

> An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.
>
> It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign. App. 59-60.

The Court recognized the fears of the moment that led to the Executive's claim of power.

> The argument for unrestricted employment of Presidential power to wiretap is basically an argument *in terrorem*. It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to acceptance of the security of "sovereign" power. We are earnestly urged to believe that the awesome power sought for the Attorney General will always be used with discretion. *Id.*

The Court of Appeals, quoting this Court's opinion in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), called attention to the grave dangers to First Amendment rights resulting from the Government's claim of authority in the interest of national security to conduct unrestricted searches and seizures of conversations. App. 60-61.

The Court thus affirmed that the Executive must be bound by the warrant requirements of the Fourth Amendment.

> But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the

> United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created and proclaimed and which, indeed, are justification for its existence.
>
> We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire. App. 62-63.

The Court affirmed that disclosure was indeed mandated by *Alderman v. United States*, 394 U.S. 165 (1969), and further stated that "disclosure may well prove to be the only effective protection against illegal wiretapping available to defend the Fourth Amendment rights of the American public." App. 67-68.

The Government thereupon petitioned this Court for a Writ of Certiorari to review the judgment of the Court of Appeals. Certiorari was granted on June 12, 1971. App. 88. The Defendant-Respondents were granted leave to proceed *in forma pauperis*.

The same issue of the President's authority to conduct warrantless national security surveillance has arisen in at least eleven criminal prosecutions. The cases known to Respondents are collected in Appendix A. The records in these cases evidence a testing of various formulations for the same claim of power, similar to that of the record in the courts below in this case.

SUMMARY OF ARGUMENT

There are certain cases in the history of this Court which touch the "bedrock of our political system," *Reynolds v. Sims*, 377 U.S. 533 (1964). These cases which involve "the very essence of constitutional liberty and security," *Boyd v.*

United States, 116 U.S. 616, (1885) invoke the historic role of this Court as "the ultimate interpreter of the Constitution," *Marbury v. Madison*, 1 Cranch 137 (1803), *Baker v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969). These cases call upon this Court, at the crossroads of our history, to stand resolutely as an "impenetrable bulwark against every assumption of power" which threatens the fundamental liberties of the people. James Madison, 1 *Annals of Congress* 439, *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971). This is once again, such a case.

- I -

The sweeping constitutional issues in this case arise out of an extraordinary claim of power asserted by the Executive which is awesome in its implications for the future and safety of the Republic. The Government seeks the approval of this Court for a claim of unlimited power to engage in wholesale wiretapping of American citizens without regard for the commands of the Fourth Amendment of prior judicial approval by a neutral and detached magistrate, a showing of probable cause and the requisite particularity, whenever in his sole judgement the political activities of these citizens or their organizations may constitute a threat to "the existing structure of the government." App. p. 200. This claim of unlimited executive power is without foundation in the Constitution, the decisions of this Court or the traditions and values of a free people.

(a) The "narrow" position the Government argues—whether a warrant issued by a "neutral and detached magistrate" *Coolidge v. New Hampshire*, 403 U.S. 443, is required—rejects the "point of the Fourth Amendment," *Johnson v. United States*, 337 U.S. 10. It has been totally repudiated by the most recent and authoritative decisions of this Court. *Coolidge v. New Hampshire, supra; Alderman v. United States*, 394 U.S. 165 (1969); *Katz v. United States*, 389 U.S. 347 (1967). The Court's opinion in

Coolidge is entirely dispositive in rejecting the Government's contention that "the neutral and detached magistrate required by the Constitution," 403 U.S. at 453, can be bypassed merely on the unreviewable determination of the Attorney General that a concededly "domestic" organization of citizens is in some vague way a threat to the "existing structure of the government" (App. 200). The Government seeks to sustain this unprecedented bid for arbitrary power by a "balancing" process which on examination reveals a sweeping intrusion into the privacy of thousands of citizens through a system of political espionage and surveillance which stands condemned by our traditions and values balanced against a supposed "inherent" power of the Executive to suspend constitutional guarantees whenever, in his sole opinion, the "national interest" required it, an "inherent" power which in the words of Justice Story would "clothe him with an absolute despotic power over the lives, the property and the rights of the whole people," a claim to power rejected by this Court in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 713 (1952) and only recently in *New York Times Co. v. United States*, 403 U.S. 713 (1971). This claim of Executive power is based on the same arguments of "necessity" and "reasons of state" which were made by the agents of George III in justifying the infamous general searches and writs of assistance out of the struggle against which, the "child Independence was born," *Boyd v. United States, supra.*

Furthermore, the supposed limitations the Government suggests on this claim of arbitrary power are totally illusory. The "standard" the Attorney General has used to exercise this vast power in this case—"attempts of domestic organizations to attack and subvert the existing structure of the Government"—fails to meet the most elementary tests of either the Fourth or First Amendments as to precision and particularity. *Baggett v. Bullitt*, 377 U.S. 372 (1964), *Shelton v. Tucker*, 364 U.S. 479 (1960). It is a standard of such extraordinary overbreadth and vagueness as to operate as a dragnet having the dangerous potential

of inhibiting "the exercise of individual freedoms affirmatively protected by the Constitution," *Baggett v. Bullitt, supra.* Nor is the "extremely limited" judicial review the Government suggests any safeguard at all against the arbitrary power it claims. To the contrary the "judicial review" proposed is wholly non-existant, and as in the 18th Century, the Executive's claim is in fact one of arbitrary power uncontrolled by any meaningful judicial review at all.

In short, the Executive argues here for a sweeping power to institute in this country a system of domestic political espionage which a constitutional authority of the past has characterized as "the heart of the administrative system of continental despots." May, *Constitutional History of England.* Such a system in the words of this Court, is the "hallmark of a police state." *Shuttlesworth v. Birmingham,* 382 U.S. 87 (1969) and offends against the "very essence of constitutional liberty and security" *Boyd v. United States, supra.*

(b) The claim of power of the Executive would sanction general searches without prior judicial authorization, a showing of probable cause or a requirement of particularity in total violation of the Fourth Amendment. This claim of Executive power would resurrect the infamous arbitrary searches authorized by the general writs of assistance which kindled the struggles of the 18th Century out of which the independence of the Nation was born. *Boyd v. United States, supra.* The dragnet nature of the electronic surveillance proposed here, without warrant, without showing of probable cause and without meeting the requirement of particularity violate the Fourth Amendment as interpreted by the many decisions of this Court. See for example *Boyd v. United States, supra; Katz v. United States, supra; Berger v. New York,* 388 U.S. 41 (1967); *Alderman v. United States,* 394 U.S. 165 (1969). It offends against the spirit of the history of the struggles against arbitrary Executive power that shaped the Fourth Amendment. *Boyd v. United States, supra; Marcus v. Search Warrant* 367 U.S. 717 (1961); *Stanford v. Texas,* 379 U.S. 476 (1965). To sus-

tain the Executive's claim would reintroduce into American life what James Otis called in his historic argument before the Massachusetts Court in 1766, "the worst instrument of arbitrary power." *Boyd v. United States, supra.*

(c) In order to justify its unprecedented reach for power, the Government once again has invoked the doctrine of "inherent" power in the Executive which sanctions the suspension of constitutional requirements when this is deemed necessary in his sole judgement. As the Court below found, this claim of power was decisively rejected by this Court in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This Court has time and again, from *Ex Parte Milligan* 4 Wall. 2 (1866) to the decision last Term in *New York Times Co. v. United States*, 403 U.S. 713 (1971), rejected the "talismanic" use of "national security," or the "war power" to sanction the evasion of fundamental constitutional guarantees.

(d) The claim of power made here by the Executive offends against the fundamental principles of separation of powers and limited sovereignty established in the first days of the Republic. The doctrines advocated here would "subvert the very foundations of all written Constitutions," *Marbury v. Madison, supra*, at 178. The history of the nation teaches that the system of separate branches of government with specific enumerated powers, restricted by the Bill of Rights, was designed to eliminate forever from the newly established Republic the dangers of arbitrary Executive power which the present claim of the Executive would reintroduce into American life.

(e) The last minute efforts of the Government to interject considerations of "foreign security" into this case in order to sustain the legality of these warrantless wiretaps, are totally unsupported by the record. The Affidavit of the Attorney General filed in the District Court explicitly states that the electronic surveillances at issue were directed solely toward "domestic organizations." In the Court of Appeals the Government specifically denied that the surveillances

were in any way related to attempts "to gather 'foreign intelligence' information" or to "gather information relating to attempts of a foreign power to overthrow our Government." The last minute attempt in this Court to interject "foreign security considerations," Government Brief at 30, n. 13, reflects a desperate attempt to camouflage the illegality under the Fourth Amendment of the warrantless surveillances involved here. Furthermore, the Government is attempting to bootstrap its unprecedented claim of Executive power to set aside constitutional limitations in the area of domestic alleged "subversion," whatever that broadly sweeping term means, upon a "foreign security" exception to the Fourth Amendment, which has not even been acknowledged by this Court, see *Katz v. United States, supra,* and in any event relates only to narrow foreign security questions not involved in this case, see *Giordano v. United States,* 394 U.S. 310, 314 (1969).

- II -

The Executive's claim of unlimited power to engage in general searches into the words, ideas and thoughts of citizens violates the First Amendment to the Constitution. As the lower Court has pointed out, "the First Amendment is the cornerstone of American freedom [and] the Fourth Amendment stands as guardian of the First." App. 61. The Executive has already opened up a broad program of warrantless surveillance against the widest spectrum of political opposition to the present administration. See App. A to this Brief. These activities generate a climate in which "fear of internal subversion," *Coolidge v. New Hampshire, supra,* operates to chill the exercise of the "delicate and vulnerable" freedoms of the First Amendment, *NAACP v. Button,* 371 U.S. 415. The Attorney General's proposed program of "investigative" warrantless wiretapping of any citizens or organizations which in his judgement threatens to "subvert the existing structure of government," unrelated to any actual criminal conduct, no less any clear and present dan-

ger of serious substantive evil, violates the most fundamental teachings of this Court in respect to the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 44 (1969); Cf. *Whitney v. California*, 274 U.S. 357 (1927) (concurring opinion of Justice Brandeis). Moreover, the standard the Executive seeks to use is the most imprecise, overly broad and vague standard ever to reach this Court for review. See *Baggett v. Bullitt*, 377 U.S. 360 (1964). It will "broadly stifle fundamental personal liberties" *Shelton v. Tucker*, 264 U.S. 479 (1960). It "lends itself to selective enforcement against unpopular causes," *NAACP v. Button, supra*, and "may easily become a weapon of oppression." *NAACP v. Button, supra*. As in *New York Times Co.* this last Term, the claim of the Executive, if sustained, "would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure."

- III -

The Executive's claim of power is not authorized, sanctioned or recognized by any act of Congress and in particular not by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as the Government argues. Quite to the contrary, the clear meaning of the entire statutory scheme in Title III indicates the intention of Congress to prohibit *all* electronic surveillance except in the narrowly defined circumstances of the Statute. Furthermore, the Government's argument that the vague words of Section 2511 (3) of the Act in some way "recognizes" warrantless national security wiretapping is entirely without merit. The Act carefully spells out the methods by which *warrants* may be obtained for all conceivable "national security" situations which might arise, even providing for emergency situations in Section 2518 (7). As the Court below pointed out, the vague language of 2511(3) "is not the language used for a grant of power," App. 57, but at best was "clearly de-

signed to place Congress in a completely neutral position in the very controversy with which this case is concerned" App. 57. To read the vague words of 2511 (3) as a "recognition" of the Executive's claim in this case, would be to render the statute patently unconstitutional. *Aptheker v. United States*, 378 U.S. 500 (1963); *Shelton v. Tucker*; *NAACP v. Button*, *supra*.

- IV -

The Government urges, in the event the Court rejects its sweeping claim for power, that the Court should reconsider its constitutional holding in *Alderman v. United States*, 394 U.S. 165 (1969) only two years ago, that conversations overheard by illegal surveillance, to which defendants have standing to object, must be disclosed for the purpose of an adversary hearing on relevance. This Court should not reconsider its decision on this question in *Alderman*. The fundamental principles of liberty embodied in the Fourth Amendment require the protection of the salutory impact of the Court's thoughtful conclusions in *Alderman*. *Alderman* is a constitutional decision of great importance. It vindicates the fundamental principle taught by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) that "in a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously." In the area of electronic surveillance only disclosure of the contents of illegal surveillance gives defendants the opportunity to prove that a portion of the case against them is the result of illegal searches and seizures. *Coplon v. United States* 185 F.2d 629 (2nd Cir. 1951); *Alderman v. United States*, *supra*. In our system of law only an adversary proceeding can protect a defendant where illegal surveillance has occurred. *Dennis v. United States*, 384 U.S. 855 (1966). Once a court has held a surveillance illegal, there is no justification for denying an adversary hearing on relevancy. The Government then has the alternative of obeying the commands of the Constitution or

dropping the prosecution, *Coplon v. United States; Alderman v. United States, supra.* As Judge Hand said so powerfully in *Coplon*, "a society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism," at 638.

ARGUMENT

I

THE CLAIM OF THE ATTORNEY GENERAL TO UNLIMITED POWER TO ENGAGE IN WHOLESALE WIRETAPPING OF CITIZENS WITHOUT REGARD FOR THE COMMANDS OF THE FOURTH AMENDMENT WHENEVER IN HIS SOLE JUDGMENT THE NATIONAL INTEREST REQUIRES IT IS DESTRUCTIVE OF THE FUNDAMENTAL PRINCIPLES OF LIBERTY CONTAINED IN THE CONSTITUTION AND THE BILL OF RIGHTS AND THREATENS THE SAFETY AND SECURITY OF THE REPUBLIC

A. *The Arguments Advanced by the Executive to Support its Claim of Unlimited Power are Without Foundation in the Constitution, the Decisions of This Court or the Traditions and Values of a Free People*

This case brings before the Court a claim of power asserted by the Executive, awesome in its implications for the future and safety of the Republic. At the heart of the Government's position is the bold contention that one man, holding an exalted position, can, in his virtually unreviewable discretion, determine that broad and sweeping electronic surveillance of American citizens can be undertaken by federal police agents totally without regard for the commands of the Constitution whenever this individual decides in his sole judgment that the suspension of historic safeguards of personal liberty enshrined in the mandates of the Bill of Rights is required in the "national interest." Government's

Brief at 6 *et seq.*[3] Such a position has seldom been urged before this Court by representatives of what has been characterized in proud moments of the past as a "government of laws and not men." *Marbury v. Madison*, 1 Cranch 137 (1803). And it is accordingly a serious and forboding question for the future of such a system of government that the Executive Branch now asserts before this Court a limitless power to supersede the guarantees of constitutional liberty whenever in their judgment alone the political activities of citizens or their organizations constitute a threat to "the existing structure of the Government." Affidavit of Attorney General, App. 20. This vast power, which the present Administration has already exercised and now asks this Court to sanctify—to conduct wholesale surveillance, through electronic techniques, of the thoughts, ideas, and conversations of citizens in opposition to those currently in power—is, in the warning words of this Court written in striking down governmental conduct which sweeps broadly across the protected freedoms of the people, a "hallmark of a police state." *Shuttlesworth v. Birmingham*, 382 U.S. 87, 91 (1965) (opinion of Mr. Justice Stewart for the Court). The power which the Executive here seeks sanction for is, as Mr. Justice Frankfurter pointed out in connection with earlier efforts to justify far less extensive executive wiretapping, too reminiscent of recent tyrannies to be permitted in a society whose highest claim to the accolades of history is its deference to the values of human freedom. Cf. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Mr. Justice Brandeis concurring).

The Executive's claim of a power to brush aside the mandates of the Fourth Amendment, the "neutral and detached

[3] As we have pointed out in the Statement of the Case, the Affidavit of the Attorney General upon which the Executive's claim to power rests, no where invokes the words "national security" as a basis for his authorization of warrantless wiretapping. His refusal to disclose the contents of the interceptions is based, in his words, upon the "national interest."

magistrate required by the Constitution," *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (opinion of Mr. Justice Stewart for the Court), the historic requirements of probable cause and particularity born out of the revolutionary struggles of the War of Independence against the tyrannical general searches of the officers of the British king, *Olmstead v. United States*, 277 U.S. 438 (1928), dissenting opinion of Mr. Justice Brandeis, *Berger v. New York*, 388 U.S. 41 (1967), reflects a dangerous and growing tendency in some to turn away from the values of personal liberty embodied in the stern mandates of an older day and set forth in the written guarantees of the fundamental law. But this Court sits as the guardian of these values, as we have been only recently reminded in words wholly dispositive of the issues in this case. In his opinion for the Court this last Term in *Coolidge v. New Hampshire, supra*, Mr. Justice Stewart rejected the assumption underlying the Government's argument here that the "fear of internal subversion" is a "talisman" which can wipe out the values embedded in the Fourth Amendment. Justice Stewart wrote for the Court:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagent' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

It is to protect these values that this Court sits, as we were taught by one of the greatest Chief Justices in *Marbury*. It was in this spirit that the Court below responded

to the claim of the Executive to a power frightening in its implications for the survival of constitutional government. The Court of Appeals formulated its responsibility at such a moment in words which reflected the "highest traditions of this Court," *Baker v. Carr*, 369 U.S. 186, 262 (opinion of Mr. Justice Clark).

> During more difficult times for the Republic than these, Benjamin Franklin said: 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.' It is the historic role of the judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and greatest Chief Justices of the United States. App. 33.

The position which the representatives of the government now urge before this Court underscores the conclusion of the Court below that this is indeed one of those periods of crisis, "when the challenge to constitutional liberties is the greatest." The government advances a claim of power, incredibly characterized as a "narrow" constitutional issue, Government's Brief at 9, that would erase the Fourth Amendment, cf. *Coolidge v. New Hampshire*, *supra*, ignore the First Amendment, cf. *New York Times v. United States*, 403 U.S. 713 (1971) and override the first principles of a constitutional government of limited powers and separation of functions, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) in order to sanction a system of wholesale surveillance and espionage over the lives of American citizens. Unless this claim of power is forthrightly repudiated by this Court, our nation will move inevitably into the shadow of that "tyranny and oppression" Justices Brandeis and Holmes warned against in their classic opinions condemning the "dirty business" of wiretapping. *Olmstead v. United States*, 277 U.S. 438, 469, 471.

1. The government's claim of limitless power to disregard in the sole discretion of one man, the most fundamental guarantees of personal liberty comes to the Court encased in a carefully constructed series of ingenious rationalizations designed to mask and camouflage the awesome implications of its bid for vast and uncontrolled power over the lives of the people of this country. The opening thrust in the argument is an astounding attempt to reassure the Court that all that is involved in this grasp for unprecedented power is a "narrow" issue—namely whether the admitted absence of a warrant representing the judgment of a "neutral and detached magistrate" *Coolidge v. New Hampshire, supra,* at 452, authorizing the wiretapping of a concededly purely domestic organization of American citizens [see Affidavit of Attorney General, App. p. 20] is a relatively minor matter unaffecting the constitutional legality of the surveillance when "balanced" against the Attorney General's judgment that the wiretapping was in the "national interest." See Affidavit of Attorney General, App. 20-21.

This assertion is hardly a "narrow" question. It totally rejects what this Court has again and again taught is the "*point* of the Fourth Amendment," see *Johnson v. United States,* 333 U.S. 10, 13-14 (1948) (opinion of Mr. Justice Jackson); *Coolidge v. New Hampshire, supra* at 449 (opinion of Mr. Justice Stewart). It blandly declines to accept what this Court has only this last Term reminded the country is "the most basic constitutional rule in this area." *Coolidge v. New Hampshire, supra* at 454.

The simple fact of the matter is that the position now urged by the Executive, the claim of power sought to be vindicated, has been decisively rejected by the most recent and authoritative decisions of this Court. *Coolidge v. New Hampshire, supra,* (opinion of Mr. Justice Stewart for the Court); *Alderman v. United States,* 394 U.S. 165 (1969) (opinion of Mr. Justice White for the Court); *Katz v. United States,* 389 U.S. 347 (1967) (opinion of Mr. Justice Stewart

for the Court); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The government argues here that where the Attorney General, acting for the President, determines that the "national interest" requires it, the Fourth Amendment may be read, in a situation like the one presented by this record, of an organization concededly "domestic" in character (see Affidavit of Attorney General, App. 20-21), as not requiring prior judicial approval of any electronic surveillance. The opinion of the Court last Term in *Coolidge v. New Hampshire* is entirely dispositive in rejecting this contention. In *Coolidge*, in his opinion for the Court, Mr. Justice Stewart reminded us once again that the command that a warrant be issued by the *"neutral and detached magistrate required by the Constitution,"* 403 U.S. at 453, is at the very *heart* of the Fourth Amendment. In words which directly repudiate the Executive's attempted deletion of the warrant requirement from the Amendment, Justice Stewart found it instructive to restate once again the incisive analysis of Mr. Justice Jackson which underlies the recent decisions of the Court enforcing the mandates of the Fourth Amendment:

> 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a police-

> man or government enforcement agent.' Cf. *United States v. Lefkowitz*, 285 U.S. 452, 464; *Giordenello v. United States, supra*, at 486. *Wong Sun v. United States*, 371 U.S. 471, 481-482; *Katz v. United States*, 389 U.S. 347, 356-357.[4]

This analysis of the "most basic constitutional rule in this area" *Id.* at 454, was forcefully stated in *Katz v. United States*, 389 U.S. 437 (1967) (opinion of Mr. Justice Stewart):

> Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello v. United States*, 269 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .' *Wong Sun v. United States*, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized

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[4]Perhaps recognizing that approval of the wiretapping here by the Attorney General, the chief federal *prosecuting* agent, hardly meets the constitutional requirement of "the requisite neutrality" which is "the whole point of the basic rule so well expressed by Mr. Justice Jackson," 403 U.S. 450, the Government attempts to suggest that in some way the search here involved was otherwise "reasonable" within the meaning of the Amendment. We discuss at some length hereafter the fact that this search met *none* of the requirements of the Amendment, neither the requirement of probable cause, nor the requirement of particularity. See Point I-B *infra*. But in any event this Court in *Coolidge* sharply rejected any such argument which would wish away the requirement of a prior judicial approval:

> As for the proposition that the existence of probable cause renders noncompliance with the warrant procedure an irrelevance, it is enough to cite *Agnello v. United States*, 269 U.S. 20, 33, decided in 1925: 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' See also *Jones v. United States*, 357 U.S. 493, 497-498; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392. ("[T]he rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.")

> that the mandate of the Fourth Amendment requires adherence to judicial processes,' *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. 389 U.S. 347, 357 (1967).

This decision of the Court in *Katz*, once again emphasizing the historic concept of the Fourth Amendment that the judgment of a "neutral and detached magistrate" that the search is permissible is the very "point" of the Amendment, 403 U.S. 449, disposes of any possible argument that the electronic surveillance involved in this case falls within any of these "few specifically established and well-delineated exceptions" 389 U.S. 347, 357. The Government dares not even attempt to argue that any of these exceptions apply.[5] The Executive's position is more devious. In the guise of urging a "new" exception unfounded in either the past decisions of the Court or the history of the Amendment, the present administration seeks to wipe out the Amendment itself in those areas of national life in which it was born and originally designed to be most crucial—the areas of militant and active political opposition to the holders of power. See *Stanford v. Texas*, 379 U.S. 476 (1965); *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In the name of the "national interest," by invoking a fear of internal "threat" to the "existing structure of the government," Affidavit of Attorney General, App. 20, the Executive seeks to obtain from this Court a sanction of the suspension of traditional

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[5] In *Coolidge* the Court pointed out that:

> The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' 403 U.S. at 443.

We discuss these exceptions to the constitutional requirement of a prior judicial warrant at Point I-B *infra*.

constitutional protections in the most sensitive areas of national life. But this Court has only last Term repudiated such attempts to undermine the values of "the authors of our fundamental constitutional concepts" through playing upon the "fear of internal subversion." Pointing out that these "times of unrest" are "not altogether unlike" the days when those who wrote out fundamental law won "by revolution on this continent—a right of personal security against arbitrary intrusions by official power," this Court in *Coolidge* last year reminded the nation that these values served by the Fourth Amendment, at the heart of which is the requirement of a "neutral and detached magistrate," have become, in the Court's words "more, not less, important." *Coolidge v. New Hampshire*, 403 U.S. at 443. Cf. *New York Times v. United States, supra.*

And in words which are so appropriate here this Court warned that "we must not lose sight of the Fourth Amendment's fundamental guarantee." 403 U.S. at 453. To the arguments, similar to those of the Government here, which assert that it is after all only a "narrow" deviation from constitutional requirements that is sought, in the time-old name of "expediency" or "national interest," the Court in *Coolidge* responded by restating its powerful and incisive warning of 100 years ago:

> Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United States*, 116 U.S. 616, 635, is worth repeating here:
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> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. 403 U.S. at 453-54.

It is within this mandate, the high duty of this Court "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," *Boyd v. United States*, 116 U.S. 616, 635 (1885), that the claim of power of the Executive in this case must be carefully examined.

2. The essence of the executive's extraordinary position in this case is a legal sleight of hand in which the traditional "values" of the Fourth Amendment, *Coolidge v. New Hampshire, supra*, vanish in a "balancing" process in which *new* values, rejected by those who wrote the Constitution, replace those of the Founders. In a truly incredible passage the Executive suggests that the central value of the right of each person to "security against arbitrary intrusions by official power," *Coolidge v. New Hampshire*, 403 U.S. at 455 is "outweighed" here because the surveillance involved is a "lesser invasion" of the privacy of citizens, Government's Brief at 13. We do not feel that it is necessary in this Court to argue extensively on this question. Mr. Justice Brandeis' prophetic words in his landmark opinion in *Olmstead v. United States*, 277 U.S. 438, 476 (1928), are sufficient to respond to the suggestion that wiretapping is a "lesser invasion" of privacy. *Id.* The Justice wrote almost fifty years ago, "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping." 277 U.S. at 476. These words of prophecy of Justice Brandeis today reflect the reality of the world about us. One hundred years ago one of England's most eminent constitutional historians, Sir Erskine May, described the deadly effect of a system of political espionage and surveillance upon a society:

> Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they

> may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say they are free? Nothing is more revolting to Englishmen than the espionage which forms the heart of the administrative system of continental despots. It haunts men like an evil genius, chills their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. May, *Constitutional History of England*, 275 (1813).

The words of this English historian a century ago strike home today in contemporary America, if our "freedom" is to be "measured by its immunity from this baleful agency." *Id.* We are already as a people at the point at which the "classic balance of privacy and surveillance has been upset." Westin, *Privacy and Freedom* (1966). In a thoughtful essay warning of the danger to the existence of a democratic society flowing from the impact of the type of surveillance the Government admits to conducting, Circuit Judge Kiley of the Court of Appeals for the Seventh Circuit spoke of:

> . . . the danger too, noted by Professor Westin, that 'surveillance of individual and group conduct—a primary means of social control—can be carried to lengths that seriously impair freedom' in democracy. In support of this view, it seems enough to contemplate the spectre of a Big Brother observing how we think, feel and act, and the oppressive moral and political climate that would tend to suffocate our freedom. Kiley, "Privacy's Last Stand," 26 *The Critic*, 41 (1967).

It is monstrous to characterize the sweeping surveillance the Government seeks to sustain, as a "lesser invasion" of the privacy of citizens. Like the system of political espionage which Sir Erskine May a century ago condemned as being at "the heart of the administrative system of continental despots," the spectre of widespread domestic surveillance over the lives, the words, the thoughts of American citizens, haunts American life today to a degree unknown in our

history. Few can disagree today with the sober warning words of Mr. Justice Douglas in 1966 in *Osborn v. United States*, 385 U.S. 323 (1966):

> The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will be vanished. 385 U.S. at 353-54 (dissenting opinion).

If the surveillance the government seeks to sanctify is permitted, if the privacy of citizens to their innermost thoughts is allowed to rest in the hands of one man's uncontrolled judgment, it will become necessary to say of Americans, as May said a hundred years ago of the subjects of "continental despots," "who shall say they are free?" The recent history of the contemporary world sadly demonstrates over and again that a system of broad surveillance of a political opposition, *always* masked in terms of protection against a "threat" to existing government, is an ominous and frightening "hallmark of a police state." *Shuttlesworth v. Birmingham, supra.* It is no "lesser" invasion of the privacy of citizens. In a fantastic inversion of values the government suggests that this "lesser" invasion of privacy which its program of domestic political surveillance would entail, is after all a "protection of the fabric of society itself." Government's

Brief at 14. But the "fabric of society," *Id.*, which "the authors of our fundamental constitutional concepts" wove, *Coolidge v. New Hampshire*, at 455, was not a society in which the personal liberties of the people would rest upon the grace or judgment of one official unfettered by the written mandates of the fundamental law. As Justice Brandeis taught, "those who our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Whitney v. California*, 274 U.S. at 375 (concurring opinion of Mr. Justice Brandeis). The "fabric of society," which the Founders created had enmeshed in its threads an understanding which James Madison, one of the "authors of our fundamental constitutional concepts," *Coolidge v. New Hampshire* at 455, set forth in uncommonly blunt words most appropriate and relevant here in considering the Government's claim that the Attorney General can ignore, at his will, the constitutional restrictions of the Fourth Amendment:

> The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained; but especially that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority and are tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them and are slaves. Madison, *Memorial and Remonstrance*, Vol. II, *Writings of Madison*, 183-191 (G. Hunt, ed., 1901). See *Walz v. Tax Commission*, 397 U.S. 694 (May 4, 1970, opinion of Mr. Justice Douglas).

A doctrine which would permit a prosecuting officer, the Attorney General, to "overleap the great barrier which defends the rights of the people," *Id.*, when in his own judgment it is necessary to do so to protect the national interest would destroy, not protect, the "fabric of society" itself. In Madison's harsh words rulers who seek to assert

such a power "are tyrants" and people who submit to such power "are slaves."

In the cauldron of "balancing" in which the constitutio protections of the Fourth Amendment are melted away, the Government then seeks to weigh the "lesser" impact of its domestic surveillance program against the "weighty" considerations of the scope of powers claimed to be vested in the President, and through him the Attorney General, by Article II, Section 1 of the Constitution "to preserve, protect and defend the Constitution and the government created by it." Government's Brief at 13. The Government seeks to infer from this grant of executive authority certain "inherent" powers[6] sufficient to allow the suspension of Fourth Amendment requirements in the area of "domestic" national security, however broadly that term may sweep. But we have been taught from *Marbury v. Madison, supra* to *Powell v. McCormack*, 395 U.S. 486 (1969), from *Ex Parte Milligan*, 4 Wall. 2(1866) to *Youngstown Sheet and Tube Co., supra*, and only this last June in *New York Times v. United States, supra*, that the obligation placed upon the nation's branches of government to "preserve, protect and defend the constitution" does not authorize men in high places to suspend or ignore the Constitution. This is, as we are constantly reminded by this Court, a "government of laws and not men." *Marbury v. Madison, supra.* From the earliest days of the Republic those who fashioned the fundamental principles designed to guide this new experiment

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[6] In the lower courts and more recently in their answering brief in the Court of Appeals for the Seventh Circuit (*United States v. Dellinger* #18295) served on November 30, 1971, the Government has expressly asserted that the President "possesses certain inherent powers" which support the claim of power exercised here. In this Court the Government assiduously avoids the use of the term "inherent powers" perhaps because of the forceful rejection of that concept as a basis for evading the commands of the First Amendment in the recent opinions in *New York Times v. United States*, 403 U.S. 713 (1971). The rationale urged is however the same absent the offending terminology.

in constitutional government were fearful of the centralization of arbitrary power in the hands of the executive. Justice Story, who sat with John Marshall on the Court that shaped the contours of our constitutional law wrote in his famous *Commentaries* a passage analyzing the powers of the President that reads as if it were written to rebut the theories advanced by the present representatives of the executive branch to justify an assumption of power in derogation of the rights of the people, without express sanction in the Constitution or the laws of the land:

> § 291. Another duty of the President is, "to take care that the laws be *faithfully executed.*" And by the laws we are here to understand, not merely the acts of Congress, but all the obligations of treaties, and all the requisitions of the Constitution, as the latter are, equally with the former, the "supreme law of the land." The great object of the establishment of the executive department is, to accomplish, in this enlarged sense, a faithful execution of the laws. Without it, be the form of government whatever it may, it will be utterly worthless for confidence, or defence, for the redress of grievances, or the protection of rights, for the happiness and good order of citizens, or for the public and political liberties of the people.
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> § 292. But we are not to understand, that this clause confers on the President any new and substantial power to cause the laws to be faithfully executed, by any means, which he shall see fit to adopt, although not prescribed by the Constitution, or by the acts of Congress. That would be to clothe him with an absolute despotic power over the lives, the property, and the rights of the whole people. A tyrannical President might, under a pretence of this sort, punish for a crime, without any trial by jury, or usurp the functions of other departments of the government. Story, *A Familiar Exposition of the Constitution of the United States*, New York, 1856, p. 177-178.

The power the Attorney General here claims, in the name of the President is "prescribed" neither in express terms by the Constitution nor by the acts of Congress. See Point II, *infra*. The government seeks to infer the sweeping authority claimed from some source of power "inherent" in the role of the Presidency. But as Justice Story pointed out, to find within the constitutional powers of the Executive sanction to use "any means which he shall see fit to adopt" would be "to clothe him with an absolute despotic power over the lives, the property and the rights of the whole people." Those who wrote the Constitution and its Bill of Rights were too close to the struggle against the British monarch to tolerate a structure of government in which the executive could indefinitely expand its control over the citizenry through a theory of undefined, uncontrolled "inherent" powers. Justice Story reflected this deep concern when he wrote:

> No man, who has ever deeply read the human history, and especially the history of republics, but has been struck with the consciousness, how little has been hitherto done to establish a safe depositary of power in any hands; and how often, in the hands of one, or a few, or many,—of an hereditary monarch, or an elective chief, or a national council, the executive power has brought ruin upon the state, or sunk under the oppressive burden of its own imbecility. Perhaps our own history has not, as yet, established, that we shall wholly escape all the dangers; and that here will not be found, as has been the case in other nations, the vulnerable part of the republic. Story, *supra* at p. 159.

Justice Story's words were deeply prophetic and "our own history" has not "wholly escape[d] all the dangers" of excessive executive power. But at each crucial point in our history when the theory of "inherent" executive power has threatened to engulf our constitutional liberties this Court has courageously rejected the concept and has reaffirmed the fundamental principles of republican government.

In *Ex Parte Milligan*, 4 Wall. 2 (1866) at the end of the Civil War, in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) in the difficult first years of the cold war; and only this last Term in *New York Times v. United States*, 403 U.S. 713 (1971) in these turbulent days of our most protracted and unhappy colonial war, this Court has consistently repudiated any effort to suspend fundamental constitutional concepts and protections in the name of a claimed national "necessity." In *Milligan* the Court bluntly warned that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall. at 121. To the argument here advanced by the Executive that it would "frustrate" the purposes behind its program of wholesale surveillance to submit its claims to the "independent magistrate required by the Constitution," *Coolidge v. New Hampshire*, *supra*, Mr. Justice Frankfurter responded in 1952 to a similar contention in words which should have destroyed this rationale for arbitrary power for all time:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 613 (concurring opinion).

And to the ultimate contention of the Executive here that the President has an "inherent power" to abrogate fundamental provisions of the Constitution in the name of "national security," only this last Term the late Mr. Justice Black responded with words which will be remembered long in the annals of this Court:

> To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure. . . . The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (concurring opinion).

The decision of this Court in *New York Times*, and the concurring opinions of Justices Douglas, Black, Brennan, Stewart, White and Marshall are totally dispositive here. As in *New York Times*, to find that the President has "inherent power" to disregard the very heart of the Fourth Amendment, the requirement of prior judicial approval of a search and seizure by a detached and impartial magistrate, would "wipe out the Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure." 403 U.S. at 719.

3. Perhaps more so than in any other case brought to this Court in recent years the teaching of Mr. Justice Holmes that a "page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1925), is decisive here. This Court has reminded us again and again that "in order to ascertain the nature of the proceedings intended by the Fourth Amendment . . . it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England." *Boyd v. United States*, 116 U.S. 616, 625 (opinion of Mr. Justice Bradley). The struggles in the colonies against the "arbitrary claims of Great Britain" culminating in the historic argument of James Otis against the writs of assistance, the "worst instrument of arbitrary power," 116 U.S. at 625, was in Justice Bradley's opinion, "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." 116 U.S. at 625. This was the struggle which evoked those

incisive and famous words of John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." 116 U.S. at 652. What is little recognized is that these first American struggles against executive oppression were *then* the inspiration for those events in England culminating in the great cases, *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765), *Leach v. Three of the King's Messengers*, 19 Howell's State Trials 1002 (1765), *Wilkes v. Wood*, 19 Howell's State Trials 1154 (1763), which have been characterized by this Court as "one of the permanent monuments of the British Constitution . . . a monument of English freedom . . . the true and ultimate expression of constitutional law whose propositions were in the minds of those who framed the Fourth Amendment." 116 U.S. 626, 627.

The central thread of this history which shaped and "framed" the Fourth Amendment was the rejection and repudiation of *precisely* those arguments which the representatives of the Executive argue now to this Court in support of their claim for power. In *Boyd*, Mr. Justice Bradley refers us to the authoritative discussion of this history in Professor Cooley's famous *Constitutional Limitations*, 116 U.S. at 625 (Note by the Court). Professor Cooley points out the lessons of this "page of history," *New York Trust Co. v. Eisner, supra*, when he reminds us that "if in English history we inquire into the original occasion for these constitutional provisions [Fourth Amendment], we shall probably find it *in the abuse of executive authority*, and *in the unwarrantable intrusion of executive agents* into the houses and among the private papers of individuals in order to obtain evidence *of political offenses either* committed or designed." Cooley's *Constitutional Limitations*, Vol. I, Chap. x, p. 612 (8th Edition, 1927). (Emphasis added).

The abuses of "executive authority" at the center of the colonial and British struggles, were justified *then* as today, by claims of necessity, national interest, or to use the phrase of the 18th century, "reasons of state." The representatives of the crown, both before the Massachusetts Court in re-

sponse to the arguments of James Otis, and in the mother-country in defense to the damage actions brought by the outraged victims of the general warrants issued by the secretaries of state, argued that "the safety of the realm," that the "necessities of state," urgently justified these broad sweeping powers asserted by the executive officers in the name of the King. Further they argued that these executive warrants were "expeditious" procedures required to prevent the "grave" injuries to the state caused by seditious libels which "threatened" to "overthrow" the existing "system of government."[7] And in earnest justification for the use of this power the representatives of the crown pleaded a century of "prior usage" by the Executive.[8] These arguments for "arbitrary power" cf. *Boyd v. United States, supra,* were analyzed, considered and bluntly rejected in the 18th Century English cases which shaped the contours of the Amendment. At the very center of the rea-

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[7]The representatives of the crown, in defense to the damage actions brought by the outraged victims of the general warrants issued by the secretaries of state, argued that "reasons of state" and the necessity to protect against "offences against government and the public peace" that "effectually undermine government" urgently justified these broad sweeping powers asserted by the executive officers in the name of the King. *See* the arguments of the Solicitor General, *Leach, supra* at 1012-20; *Entick, supra* at 1039-41; *Wilkes, supra* at 1158-60. The executive insisted that "this power is essential to government, and the only means of quieting clamours and sedition." *Entick, supra* at 1064. And in earnest justification for the continued use of this power, the representatives of the crown pleaded its prior "usage tolerated . . . and continued" for a century. *Entick, supra* at 1067; *Wilkes, supra* at 1167.

[8]The government here pleads "prior usage" in a similar fashion as a justification for the claim of power asserted. The response of the English courts that prior illegality does not sanction present conduct, see for example *Entick v. Carrington, supra,* is very similar to the position of this Court recently in *Powell v. McCormack,* 395 U.S. 486. (1969), rejecting the contention that past unconstitutional practices of the House of Representatives in excluding members-elect, could in any way sanction or justify a present unconstitutional exclusion.

soning which led to the fashioning of those principles of liberty which have become a "monument" of freedom, 116 U.S. at 625, was the express recognition that it is *precisely* when "reasons of state," of "national interest" are asserted, cf. Affidavit of Attorney General, that the liberties of the people may *not* be left to the sole discretion of representatives of the sovereign. Thus in *Entick v. Carrington, supra,* Lord Camden rejected directly the rationalization of executive power that invokes "national interest" or "reasons of state" as a talisman designed to erase the protective barriers of probable cause, particularity, and the prior determination of an impartial magistrate. In 1765 Lord Camden wrote in words which dispose of the contention of today's advocates of sweeping executive power, the representatives of the government in this appeal:

> It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislation be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.
>
> Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of state' different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.
>
> If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative. *Entick, supra* at 1073.

The bold powerful words of Lord Camden two centuries ago cut to the heart of the Government's arguments here. If "the king himself has no power to declare when the law ought to be violated for reason of state" neither does the present Executive or his representative, the Attorney General. The English experience out of which the Fourth Amendment emerged rejects out of hand the invocation of "national interest" or "state necessity" as a justification for ignoring the protections to liberty which the Amendment incorporates. To use the words of the recent decision in *Coolidge*, history teaches that the word national security "is not a talisman in whose presence the Fourth Amendment fades away and disappears" 403 U.S. at 461, 462. Doctrines of "reasons of state" and "state necessity" have throughout history been the justification advanced for the exercise of arbitrary power. The great struggles for liberty in the 18th century that were our constitutional heritage stand today as a reminder that the preservation of individual freedoms depends often upon courageous judges who stand resolute against the "pernicious doctrines" which would undermine the protections of the constitution. *Ex Parte Milligan, supra.*

4. Perhaps conscious of this deep rooted aversion in our constitutional tradition to open-ended doctrines of "national interest" or "inherent powers"[9] which serve to erode and

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[9]The compiler of Howell's State Trials includes at the conclusion of the report of the landmark case of *Wilkes v. Wood* a comment by "the learned and constitutional author of the 'Canadian Freeholders' (Dialogue 2d, p. 242) which is enlightening in respect to the rejection of the doctrines of state necessity as a justification for executive warrants without prior judicial approval. The commentator wrote in respect to secretaries of state:

> Persons of this description, when they are placed in stations of authority, are much more likely to advise their sovereign to do acts of an irregular, or doubtful nature, without inquiring how far the law allows of them, than a learned and grave lord chancellor, if it were but through mere ignorance, and though their intentions were very pure: but it often happens that to this ignorance of the law they add a contempt for it, and a disposition to disregard its restraints, and overleap the

then nullify guarantees of individual liberty, the Government in this appeal has attempted to assuage these fears by suggesting "limitations" which operate upon the awesome powers it claims for the Executive. These "limitations" when examined closely are illusory.

First among these supposed protections is the suggestion that the "standard of national security that the Attorney General applies is the same standard Congress provided in the Omnibus Crime Control and Safe Street Acts of 1968." We discuss later in the Brief (Point II, *infra*) the impact of 18 U.S.C. 2511 (3) upon the statutory scheme requiring judicial authorization for electronic surveillance. Whatever the meaning of this provision,[10] it is perfectly clear that the Attorney General in this case, contrary to the bland assertions in the Government Brief, meets neither the standards of "national security" set forth in this section nor any standards of preciseness and particularity required by the First and Fourth Amendments to the Constitution.

The Affidavit of the Attorney General invokes a vague and general power to "gather intelligence information"

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limits it prescribes to their authority, which they are apt to consider as narrow pedantic rules which it is below their dignity to submit to and, like Achilles in the character given of him by Horace, 'Jura negant sibi nata, nihil non arrogant armis.' They are therefore fond of the doctrines of 'reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the crown to proceed sometimes by uncommon methods not agreeable to the known forms of law,' and the like dangerous and detestable positions, which have ever been the pretence and foundation for arbitrary power. *Wilkes, Id.*, at 1168-69.

[10]The Court below held that the language in Section 2511 (3) "is not the language used for a grant of power" and was "clearly designed to place Congress in a completely neutral position" in respect to the claim of executive power made in this case. Judge Ferguson in the District Court in *United States v. Smith*, on the other hand, read 2511 (3) together with the rest of the statutory scheme, as a positive statutory *prohibition* against the claim of executive power made here.

through wiretapping when "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Affidavit of Attorney General, App. 20-21. Such a standard to guide executive action in a field which by admission intrudes into the most vital and delicate of personal liberties, *Olmstead v. United States, supra* (opinion of Justice Brandeis), fails to meet the most elementary standards of either the First or Fourth Amendments as to precision and particularity. The extraordinary overbreadth and vagueness of these terms, "attempts" to "attack and subvert the existing structure of the government," operate as a sweeping dragnet which has the dangerous potential of inhibiting "the exercise of individual freedoms affirmatively protected by the Constitution," *Baggett v. Bullitt*, 377 U.S. 372 (1964) (opinion of Mr. Justice White). By its very terms, it is inevitable that the use of such a standard will "broadly stifle fundamental personal liberties," *Shelton v. Tucker*, 364 U.S. 479 (1960) (opinion of Mr. Justice Stewart). Such a standard "lends itself to selective enforcement against unpopular causes," *NAACP v. Button*, 371 U.S. 415 (1963) (opinion of Mr. Justice Brennan), and "may easily become a weapon of oppression," *NAACP v. Button* at 436. Far from being a "limitation" upon the claims of power asserted by the Executive, the standards used here by the Attorney General permit the broadest incursions into protected political activities under the First Amendment. As the Court taught in *Baggett v. Bullitt*, the activity swept into the arena of permissible surveillance by these standards "goes beyond overthrow or alteration by force or violence." 377 U.S. at 370. As Mr. Justice White asked for the Court in *Baggett*, would the term "subvert the existing structure of the government" include "any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments?" 377 U.S. at 370. Would such organizations or persons be "engaged in subversive activities," 377 U.S. at 370, which "subvert the existing structure of the government," Affidavit of Attorney General, App. p. 20, and thus

be subject to warrantless wiretapping at the sole discretion of the Attorney General?" And as Justice White asked for the Court in *Baggett* would "support [of] the repeal of the Twenty-Second Amendment or participation by this country in a world government," 377 U.S. at 370, subject a citizen to the sweep of the Attorney General's standards and thus to warrantless wiretapping? The standards used by the Attorney General in this case are far vaguer and broader than those condemned by this Court in *Baggett*, in *Button*, in *Elfbrandt v. Russell*, 384 U.S. 11 (1966), in *Keyishian v. Board of Regents*, 385 U.S. 258 (1967). As Justice White wrote in *Baggett* "the questions put by the Court in *Cramp* may with equal force be asked here," 377 U.S. at 368. Does the sweep of warrantless wiretapping "reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party?" *Baggett v. Bullitt* at 638. These possibilities are unhappily not purely "fanciful," 377. As Justice White asked in *Baggett*,

> Where does fanciful possibility end and intended coverage begin?
>
> It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltness behavior nevertheless remains. 'It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human.' *Cramp, supra*, at 286-87, 377 U.S. 372.

From the stormy days of the 18th century in the colonies and the mother-country until the present period, history confirms the conclusions of this Court in *Baggett* that

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prosecutors, even the chief law officers of nations, are "human too" and that the liberties of the people cannot be entrusted to vaguely drawn overbroad grants of power particularly where the exercise of this power is hidden and cloaked and virtually unreviewable. The awesome implications of the overly broad grant of power to engage in internal domestic electronic surveillance which the present Administration seeks are frightening in their potential when considered against the background of the decided cases of this Court. As this Court wrote in *Berger v. New York*, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices," 388 U.S. 41, 63.

Are the Washington State teachers protected by this Court in *Baggett* from the overbreadth and sweep of the statutory terms there struck down, now to be subject to the warrantless wiretapping authorized by standards infected with the identical vice of overbreadth and vagueness condemned in *Baggett?* Are the civil rights organizers and lawyers of Louisiana protected from prosecution in *Dombrowski* under similarly worded standards rejected as overbroad and vague now to be subject to warrantless executive wiretapping? And the leaders of black organizations in Alabama protected in *NAACP v. Alabama?* Or the New York teachers protected from similar overbroad standards in *Keyishian?* The list can go on and on. Is this "fanciful possibility" or "intended coverage," *Baggett v. Bullitt* at 377? This Court has already given the answer the Constitution demands time and again. "It would be blinking reality," 377 U.S. at 377, not to recognize that "there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." 377 U.S. at 360. The freedoms of the people may not be remitted to "well intentioned prosecutors," 377 U.S. at 360, even Attorneys General. *Cf. Entick v. Carrington, supra.* As Justice Brennan wrote for the Court in *Keyishian* the standard here used is "plainly susceptible of sweeping and improper application." 385 U.S. at 599. And as the Court warned in *Key-*

ishian the vagueness and sweep of the terms used here, "attempts" to "attack and subvert the existing structure of the Government," (Affidavit of Attorney General), create "uncertainty as to the scope [which] makes it a highly efficient *in terrorem* mechanism." 385 U.S. at 601.

This Court is now asked to sustain a claim of power to set aside the Fourth Amendment and authorize wholesale espionage through electronic surveillance, a euphemistic term for that "dirty business" Justice Holmes warned of years ago in *Olmstead*, against American citizens who may be engaged in activities which one man, the Attorney General, may believe "subvert the existing structure of the Government." These are not our words, or paraphrases. These are the words of the Attorney General himself. They are words this Court in *Baggett*, in *Dombrowski*, in *Keyishian*, in *Cramp*, has consistently struck down as overly broad and vague in setting standards for governmental action which touches fundamental liberties. The power which the Government here claims, unprecedented in our history, would sanction an arbitrary use of executive power to conduct espionage and surveillance over Americans exercising their basic right to oppose, dissent from, and organize politically against the policies of the existing government. In the words of Justice Stewart in *Shuttlesworth* such a claim of power "bears the hallmark of a police state," 382 U.S. at 91. The "security of the Republic" demands its forthright rejection by this Court. *Stromberg v. California*, 283 U.S. 359 (1951).

5. Again, perhaps conscious of the frightening implications of such a claim of power, the Government suggests that a safeguard of sorts exists in the "limited judicial review," Government's Brief at 21, to which the surveillance is subject. This suggestion is disingenuous if not consciously misleading. The government first asserts that "once the surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment, just as they review any other search and seizure that is challenged in the criminal proceeding by a mo-

tion to suppress or on objection to the evidence." *Id.* The government then proceeds to outline a proposed standard of review which turns the courts into a docile rubberstamp for any action whatsoever which the Attorney General may take. The "review" which is contemplated is candidly characterized as "extremely limited." *Id.* A more precise formulation would be "non-existent." "Review" is limited to whether the Attorney General's determination is "arbitrary and capricious." *Id.* The courts are to be excluded wholly from considering whether the "particular organization, person, or event involved has a sufficient nexus to protection of the national security to justify the surveillance." *Id.* This is because the "facts and considerations" upon which this depends, "necessarily must be kept confidential." *Id.* At this point the true character of the "review" deemed permissible emerges. With a burst of candor the government admits that its real position is that "the nature of the gathering of domestic intelligence information makes inappropriate *any attempt* by the courts to review the need or wisdom for a particular surveillance." *Id.* at 22-23. In short *no* review by the courts of *any* "particular" surveillance is to be allowed. This is an assertion of unreviewable arbitrary power unparalleled in the history of the country. We may pardonably ask the government what issues it considers "appropriate" for judicial review if the "need or wisdom for a particular surveillance" is to be foreclosed to the courts? We surmise the answer will be the response given to the Parliament by the agents of George III that the only question open to review on the issuance of the general warrants was whether it was sealed by the King's seal. See *Entick v. Carrington, supra.* Here, as in 18th century England, the claim of executive power is a claim of arbitrary power uncontrolled by any meaningful judicial review. Only the word of the Attorney General stands between the citizen and his or her liberties. And this word we are asked to ac-

cept as unreviewable, as above the law, as long as it is his word.[11]

6. The Government rests its demand for power on its contention that adherence to the requirements of the Fourth Amendment would "frustrate" the purpose of the "investigative" surveillance program. This "frustration" it is claimed, would result from the "need for secrecy" and the "potential dangers to lives of informants." To put it bluntly the Government argues in essence that the mandates of the Constitution must be set aside in cases involving *as here* "attempts to subvert the existing system of government," because in such cases the judiciary cannot be trusted with the information upon which the executive seeks to act. This is an argument ill-becoming a government of limited powers and separate functions. *Marbury v. Madison, supra*. The reasoned response of the Court of Appeals for the Sixth Circuit completely repudiates the Government's rationalization.

> Of course, it should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic surveillance. What the Fourth Amendment does is to establish the method they must follow.

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[11] The position of the Government is particularly ironic in this case since the Government in this Court impeaches the veracity of the Attorney General himself in the very affidavit which is the heart of their case and the foundation of their assertion of power. In this affidavit the Attorney General without qualification, characterizes the surveillance involved as being that of a "domestic" organization. In Footnote 13 to its brief the government says that "any characterization of the organization in question as 'domestic' is unsupportable." If the government itself finds "unsupportable" the characterizations of the Attorney General how can the liberties of a free people be entrusted to his unreviewable power?

> If, as the government asserts, following that method poses security problems (because an indiscrete or corruptible judge or court employee might betray the proposed investigation), then surely the answer is to take steps to refine the method and eliminate the problems. No one could be in better position to help the courts accomplish this goal than the Attorney General. App. 61-62.
>
> If there be a need for increased security in the presentation of certain applications for search warrants in the federal court, these are administrative problems amenable to solution through the Chief Justice of the United States and the United States Judicial Conference and its affiliated judicial organizations. The inclination of the judiciary to meet the practical problems of enforcement in this area is evidenced in the specific holding of this Court and the United States Supreme Court in *United States v. Osborn*, 350 F.2d 497 (6th Cir. 1965), *aff'd*, 385 U.S. 323 (1966), and in the dictum in *Katz v. United States*, 389 U.S. 347 (1967), upon which the search warrant terms of the Omnibus Crime Control & Safe Streets Act § 2516 were largely based. Congress clearly conceived situations so delicate that, for example, the Attorney General might seek his warrant for a search from the Chief Judge of the appropriate United States Court of Appeals. 18 U.S.C. § 2510 (Supp. V, 1965-69). So do we. But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created and proclaimed and which, indeed, are justification for its existence. App. 62-63.

As the Court of Appeals so eloquently has pointed out, no argument based upon a need for "security" justifies the evasion of the Fourth Amendment attempted here. The truth of the matter is that "security" is not the real motivation behind the claim of power asserted. The Govern-

ment reveals what is really at stake when it admits that in the surveillances sought to be sustained "the justification for the surveillance ordinarily cannot be simply stated or easily demonstrated." Government's Brief at 25. History teaches us that this is the position which advocates of unrestrained executive power always take. The "jsutification" for these searches and seizures cannot be "simply stated" or "easily demonstrated" precisely because "[t]his gathering of information is not undertaken for the prosecution of criminal acts." Government's Brief at 16. If it was they could clearly meet the necessary showing of "probable cause" required by the Amendment. *Katz v. United States, supra,* and could comply with the conditions of the 1968 statute which permits surveillance upon the issuance of a warrant. See Point II, *infra.*

The extraordinary truth is that the Executive is *not* seeking the broad unlimited powers it asks for here to meet alleged problems of criminal conduct "dangerous" to the security of the nation, in which it could meet the classic requirements of probable cause and particularity which the "neutral and detached magistrate required by the Constitution," *Coolidge v. New Hampshire, supra,* can pass upon. The powers the Executive here seeks are quite to the contrary to be used for the gathering of political information useful perhaps in crushing a domestic political opposition, but hardly needed to safeguard against criminal conduct of a serious nature. It is true that the "justification" for such wiretapping of domestic political opponents cannot be "simply stated" or "easily demonstrated," Government's Brief at 25, but this is because under the Constitution it would be difficult indeed to "easily" demonstrate the need for espionage and surveillance of political activities of citizens unrelated to and removed from the threat of immediate criminal conduct. And it would be even more difficult to "demonstrate" the need for a general search into the thoughts, the words, the innermost beliefs of citizens merely because one official believed that the citizen was attempting to "subvert the existing system of government." It was precisely this type of search which

the Amendment was designed to prohibit forever. As this Court wrote in *Marcus v. Search Warrant*, 367 U.S. 717 (1961):

> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. *Id.* at 729.

In short, the Government is here arguing for a power, unrelated to the gathering of facts needed for a criminal investigation, a situation "traditionally appropriate for a determination of probable cause," cf. Government's Brief at 23, but required, so it says, for the gathering of "intelligence" related to domestic "attempts to subvert the existing government." Affidavit of Attorney General. This, in the language of our constitutional history, is an overt attempt to institute in this country "the espionage which forms the heart of the administrative system of continental despots." May, *Constitutional History of England, supra.* Such a system, the bulwark of the "tyranny and oppression" warned against by Justice Brandeis in *Olmstead*, violates the history, the spirit and the letter of the Fourth Amendment. It offends against "the very essence of constitutional liberty and security." *Boyd v. United States*, 116 U.S. 616. The use of wiretapping as a basis for collecting political information from citizens active in domestic movements of political opposition, for the benefit of the administration in power, is, as the history of the twentieth century teaches, the "hallmark of a police state," *Shuttlesworth v. Birmingham, supra.* The government complains that meeting the requirements of the Fourth Amendment and in particular the "point" of the Amendment, the mandate of prior judicial approval by a "neutral and detached magistrate," *Coolidge v. New Hampshire, supra,* "frustrates" the purposes of such surveillances. We agree. This is what the Fourth Amendment is all about; a prohibition written into our fundamental law against unlimited, uncontrolled executive power to search out at will

the innermost thoughts, ideas, and words of citizens who are political opponents of those momentarily in power. *Boyd v. United States; Marcus v. Search Warrant; Katz v. United States; Coolidge v. New Hampshire,* all *supra.*

7. The final resort of the Government in its efforts to sustain this awesome claim of power for the Executive is the argument that throughout history, to paraphrase Dr. Johnson's famous comment, has been the last refuge of those who would build instruments of arbitrary executive power at the expense of the rights of the people. This is the raising of the spectre and fear of a "foreign" menace to justify the oppression of a political opposition at home. This was the ultimate argument of the ministers of George III to justify the demand for unlimited executive power to make general searches, see *Entick, Wilkes, Leach,* all *supra.* This was the argument raised to justify the now universally condemned Alien and Sedition Acts of 1798, see *N. Y. Times v. Sullivan,* 376 U.S. 254, 273 (1964); this was the argument the slaveholding states used to justify suppressing abolitionist "propaganda" as the work of "foreign" agitators;[12] this was the argument used to justify the infamous Palmer Raids of 1920 which called forth the scathing denunciation of Mr. Justice Frankfurter prior to his appointment to this Court;[13] this was at the heart of the excesses of the years of the Cold War.[14]

And once again, in an effort to justify arbitrary executive power over the fundamental liberties of the people, representatives of an administration in power raise before this Court the false issue that the sweeping bid for control they seek is required because of some "foreign" threat to our security. We discuss at a later point the utter ground-

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[12]See, George McDuffie, *Message to Legislature of South Carolina,* 1835, reproduced in Scott, *Living Documents in American History,* Vol. 1, p. 323.

[13]See generally Peterson and Fite, *Opponents of War, 1917, 1918.*

[14]See generally Arthur Link, *American Epoch,* Ch. 27.

lessness of any reliance upon a so-called "foreign security" exception to the commands of the Fourth Amendment as a justification for the surveillances involved in this case. See Point I-B *infra*. What must be stressed at this point is that this calculated attempt at the last stages of this case to introduce into the record considerations of supposed "foreign security problems," Government's Brief at 30, 31, merely underscores the danger to constitutional freedoms which flows from a cavalier insertion of a "foreign" component whenever the government seeks to justify the evasion of constitutional commands. This case simply does not involve "foreign security problems." We do not have to speculate on this. The Attorney General himself in the only sworn statement before the District Court, the Court of Appeals, and this Court, has said that the surveillances concerning the respondents in this case were of a "domestic" organization involved, according to the Attorney General, in "attempts to subvert the existing structure of the government." App. at 20. There is not a word in the affidavit about any "foreign security problems" whatsoever. Not until the brief filed in this Court have there been any suggestions that such considerations were present in respect to the surveillances here involved. We do not believe it necessary to argue at any length in this Court that the most elementary principles of fairness restrict the Attorney General to the statements made in his own affidavit which are the only facts in the record before the Court as to the nature of the surveillances. Cf. *Cole v. Arkansas*, 333 U.S. 196 (1948). The Solicitor can hardly be heard to impeach the Attorney General's own affidavit on the one hand, and then blandly ask the Court on the other hand to sustain as a matter of executive power the Attorney General's right to decide when the Fourth Amendment is to be violated. Cf. *Entick v. Carrington, supra*. But the real lesson in the Government's attempt to equate by legal sleight of hand "domestic" warrantless wiretapping with "foreign security problems," is the ease with which such maneuvering could wipe out Fourth Amendment fundamental protections for all the

people merely by an assertion that in effect *all* domestic political opposition today is intermingled with "foreign security considerations." As in the first days of the Republic when the cry of "French agent" greeted every Jeffersonian anti-Federalist,[15] the claim of "foreign" connections can be raised to tar every aspect of domestic political opposition in contemporary America. This is not idle speculation as most impartial observers of the 1950's in this country have commented. If the Attorney-General can conduct warrantless general searches into the ideas, conversations, and opinions of any American on his own vague, unilateral determination that their political activities in some way involve "foreign security considerations," with nothing more to sustain this than the affidavit in this case, then in truth the word "national security" has become "a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire, supra.* This Court taught in *United States v. Robel*, 389 U.S. 258 (1967), that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." 389 U.S. at 263. And in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 389 (1934), the Court reminded the nation that "[E]ven the war power does not remove constitutional limitations safe-guarding essential liberties." 290 U.S. at 426. The warning words of this Court in *Robel* teach us the implications of the government's last minute attempt in this case to obscure the fundamental issues involved by raising a baseless contention of "foreign security considerations."

> . . . this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals

[15] D. Stewart, *The Opposition Press of the Federalist Period*, chap. 8 (1969).

> enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic, if in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile. *Robel, supra* at 263-64.

The Government closes its plea for the extraordinary powers sought by assuring the Court that "if the Attorney General should ever abuse his authority . . . the courts could correct the situation." Government's Brief at 35. We suggest to the Court that this is a moment ominous in its implications for the future of this nation, a moment which calls for this Court once again, to "correct the situation" by reaffirming the fundamental mandates of the Constitution. The issues raised here touch, as this Court has taught, our "most fundamental constitutional concepts." *Coolidge v. New Hampshire.* The sweeping and awesome power which the representatives of the present Executive seeks would sanction the reappearance in our society of what James Otis declared in Boston in the year 1761 was "the worst instrument of arbitrary power." *Boyd v. United States, supra* at 625. If the position of the government is sustained here general warrantless searches and seizures will have been sanctioned by this Court as an instrument of executive power, and the most fundamental principles of our system of government, in the words of this Court, "the very essence of constitutional liberty and security," 116 U.S. at 630, will have been abandoned in the name of arbitrary executive power. The "security of the Republic," *Stromberg v. California,* demands that this Court exercise its awesome responsibility to restrain the Executive Branch from crossing those boundaries placed upon its powers by the sovereign people in the fundamental compact. Cf. *Marbury v. Madison, Youngstown Sheet and Tube Co. v. Sawyer, Powell v. McCormack.* As Mr. Justice Harlan wrote in one of his last opinions for this Court, this duty to "say what the law is" *Marbury v. Madison,* "inheres in the struc-

ture of the constitutional system itself." *Oregon v. Mitchell*, 400 U.S. 112, 205 (1971). The liberties of the people, the safety of the Republic itself, demand that the claims of the Executive for sweeping, unlimited and arbitrary power to conduct warrantless wiretapping of American citizens be firmly rejected. As the Court said in *Reynolds v. Sims*, 377 U.S. 533 (1964), the "oath" and the "office" of the judiciary "demand no less."

B. The Claim of Power of the Executive Would Sanction Sweeping General Searches Without Prior Judicial Authorization, a Showing of Probable Cause or a Requirement of Particularity in Total Violation of the Fourth Amendment.

1. *The power claimed by the executive would resurrect the arbitrary searches authorized by the infamous general writs and writs of assistance which kindled the struggles of the 18th century out of which the independence of the nation was born.*

The enormity of the claim of power which the Executive makes here becomes clear when it is considered against the backdrop of our experience as a people. For the first time before this Court the representatives of an administration in power have asked boldly for an imprimatur of legality to be placed upon a program of uncontrolled wiretapping and surveillance of thousands of Americans whose political activities in the sole judgment of one man may tend to "subvert the existing system of government." This proposed system of domestic espionage which would sweep into its net countless numbers of citizens whose thoughts, ideas, opinions and associations may clash with those in high places, cf. *Baggett v. Bullitt*, 377 U.S. 360 (1964), *NAACP v. Button*, 371 U.S. 415 (1963), *Keyishian v. New York*, 385 U.S. 258 (1967), not only transgresses against the "point" of the Fourth Amendment, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the "governing principle, justified by history and by current experience," *Camara v. Muni-*

cipal Court, 387 U.S. 523, 528 (opinion of Mr. Justice White), that a search violates the Amendment as "unreasonable" "unless it has been authorized by a valid search warrant," 387 U.S. at 529. See Point I A, supra at 19. Even more frighteningly, the program which the Executive has here for the first time publicly admitted to the country it has been undertaking, and now seeks sanction for, would reinstate in full force the broad general searches authorized by the infamous general warrants and writs of assistance which flourished in the "abuse of executive authority," Cooley's *Constitutional Limitations*, *supra* at 612, which characterized the rule of George III. The extraordinary nature of the Executive's demand for power can only be really grasped when the nature of the program the Attorney General has undertaken is examined against the backdrop of the 18th century struggles out of which "the Child Independence was born." *Boyd v. United States*, 116 U.S. 616 (1885).

The Attorney General is now authorizing electronic surveillance of domestic organizations and citizens without a showing of probable cause that the surveillance will uncover evidence of crime. Thus he states to this Court:

> This gathering of information is not undertaken for the prosecution of criminal acts, but rather to obtain the intelligence data deemed necessary to protect the national security. Government's Brief at 16

The Attorney General's sole judgment or suspicion that an individual or group is somehow "subversive" justifies electronic surveillance of all the subject's conversations and activities, no matter if they are entirely lawful. Indeed, the Government states:

> The traditional standard of probable cause would be wholly inappropriate for testing the reasonableness under the Fourth Amendment of this category of search and seizure. Government's Brief at 23

Since the surveillance is not directed at any specific criminal activity, there is of course no "particularity" as to the people to be searched or the conversations to be seized.

The "roving ear" of federal agents is omnipresent since apparently all the Attorney General requires is mere suspicion that the subject of surveillance is of a "subversive" nature, whatever that may mean. See Point I A, *supra*

The Government then boldly asked this Court to ignore the constitutional mandate that searches may only lawfully occur upon a showing of probable cause and the issuance of a prior judicial warrant which describes with particularity the things to be seized. *Boyd v. United States, supra; Marcus v. Search Warrant,* 367 U.S. 717 (1961); *Stanford v. Texas,* 379 U.S. 476 (1965); *Katz v. United States,* 389 U.S. 347 (1967); *Coolidge v. New Hampshire, supra.* This request for an "exception" to the Amendment's commands is in reality a request for an outright repeal of the Amendment's fundamental requirement of probable cause and particularity.

Even when exceptions to the warrant requirement of the Amendment have been granted in a few specified and narrowly restricted situations, see *Coolidge v. New Hampshire, supra,* such exceptions are never sustained where probable cause for the search does not otherwise exist and the requirement of particularity is not also preserved.[16] In all

[16] For example, *Chimel v. California,* 395 U.S. 756 (1967), allows for a limited search incident to a lawful arrest strictly confined to the suspect's person and the area within his immediate reach. Cf. *Terry v. Ohio,* 392 U.S. 1 (1968), authorizing a limited patdown for weapons when a police officer has reason to believe he is in physical danger from an armed individual. In *Warden v. Hayden,* 387 U.S. 294 (1967), the Court permitted a search by police officers in hot pursuit where they had reason to fear for their own safety and the safety of others, making the delay occasioned by the obtaining of a prior warrant highly dangerous.

Searches of automobiles have posed a particularly difficult problem for the court and in a series of cases, warrantless searches that have otherwise adhered to Fourth Amendment standards have been allowed. See generally *Carroll v. United States,* 267 U.S. 132 (1925); compare *Preston v. United States,* 376 U.S. 364 (1964); see also *Cooper v. California,* 380 U.S. 58 (1967); *Harris v. United States,* 390 U.S. 234 (1968).

cases a clear judicial "purpose to guard against all general searches" has been consistently preserved. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1930). Here, the Executive brushes aside as non-existent the requirements of probable cause and particularity. The Government attempts to justify the flagrant disregard of the requirements of the Fourth Amendment by arguing that electronic surveillance is a search conducted by stealth rather than force, and therefore, a "lesser" invasion of privacy:

> The overhearing of a telephone conversation—and particularly where, as here, the speaker's own telephone has not been tapped but the overhearing results from his telephone call to a number that is under surveillance (see h, , *infra*)—involves a lesser invasion of privacy than a physical search of a man's home or his person. While such surveillance is subject to the Fourth Amendment *(Katz v. United States, supra)*, the determination of its reasonableness properly should take cognizance of the extent of the invasion of privacy involved. Government's Brief at 13.

This Court has always rejected the view that the degree of physical force employed in the execution of a search is in any way relevant to the lawfulness of the search. The essence of the Fourth Amendment is the protection of personal security and privacy against invasion *by any means*. As this Court said so forcefully in *Boyd v. United States*,

> *It is not the breaking of his doors, and the rummaging of his papers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property*, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. 116 U.S. at 630 (emphasis added)

This Court has recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eaves-

dropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). Unlawful seizures of conversations by mechanical means are fully as serious under the Fourth Amendment as any unlawful intrusion by government into a citizen's security. Mr. Justice White applied this principle, writing for the Court in *Alderman v. United States*, 394 U.S. 165, 179 (1969):

> We adhere to the established view in this Court that the right to be secure in one's house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property—"papers" and "effects." Otherwise, the express security for the home provided by the Fourth Amendment would approach redundancy. The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; 394 U.S. at 179-80

In *Alderman*, the Court also rejected the view that the seizure of a third person's conversation by an unlawful wiretap was thereby made less serious.

> the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner but to others. *Id.* at 180

The Government's argument exposes the dragnet nature of electronic surveillance, and its harsh intrusion upon the privacy of even those under no suspicion of any criminal conduct. It is necessary to be blunt and direct. The investigative surveillance program the Attorney General has admitted he has initiated and for which he now seeks the approval of this Court, is a program of sweeping general searches without probable cause or particularity. These are the searches once authorized by the hated general warrants and writs of assistance upon whose destruction this country built its freedom and independence. The proud history of

the struggle against these instruments of "oppression and tyranny," *Olmstead v. United States* (opinion of Justice Brandeis), has been often retold in this Court. *Boyd v. United States; Marcus v. Search Warrant, Stanford v. Texas,* all *supra.* The enormity of the Executive's claim of power made in this case requires that it be considered against a brief restatement of the history which was fresh "in the minds of those who framed the Fourth Amendment to the Constitution," *Boyd v. United States, supra* at 627.

The Fourth Amendment embodies the fruits of a long struggle both in England and the colonies against the abuses of unrestrained and unsupervised search power. From their own experiences in the colonies and familiarity with recent events in England, the proponents of an addition of a Bill of Rights to the Constitution had a clear understanding of the vices of general warrants and writs of assistance, *Boyd v. United States, supra.* The requirements of probable cause for issuance of a warrant and particularity of description of the objects or persons to be seized were thus designed to prevent an abusive use of the search power without depriving government of the means to obtain evidence of crime.

A broad search and seizure power had first been utilized in England by the Tudors, and was used both for suppression of seditious writing and control of the smuggling trade.[17]

Abuses of the search power were gradually checked by Parliament and concurrently by the development of the common law. In 1685 the House of Commons impeached

[17] James I commanded the Court of High Commission "to inquire and search for . . . . all heretical, schismatical and seditious books, pamphlets and portraitures offensive to the state or set forth without sufficient and lawful authority" and seize the materials and the presses used to print them. Landynski, *Search and Seizure and the Supreme Court 22* (1966). During the reign of Charles I, in an attempt to collect trade duties, the Privy Council authorized messengers "to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and break any bulk whatsoever." Lasson, *The History and Development of the Fourth Amendment* 30 (1937)

the chief justice, with one of the counts against him being his issuance of "general warrants for attacking the person and seizing the goods of his majesty's subjects, *not named or described particularly*, in the said warrants; by means whereof many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law." See *Lasson, supra* at 38. More important than the actions of Parliament was the development of the common law. Most prominent of the common law jurists was Chief Justice Hale, who in his *History of the Pleas of the Crown* set down standards that would later become constitutional principles here in the United States. Hale said that search warrants were proper on the grounds of "necessity, especially in these times, where felonies and robberies are so frequent," but stated that a warrant must meet certain standards to be valid. Hale declared that a complainant seeking a warrant should be required to demonstrate probable cause before its issuance.

> They [warrants] are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do show his reasons of such suspicion. Hale, II *History of the Pleas of the Crown*, 149-50 (1st Am. ed. 1847)

The Secretary of State nevertheless continued to employ prosecutions for seditious libel as a means of regulating the press and issued general warrants to aid in the seizure of seditious literature. However, powerful opposition to this practice did not arise until 1762 with the famous case of John Wilkes and John Entick.

Wilkes, then a member of Parliament, published anonymously a series of pamphlets called the *North Briton*, which were highly critical of the government. In 1763, No. 45 of the series appeared, containing a bitter attack upon the King's Speech calling for obedience to enforcement of the

cider tax.[18] Lord Halifax, the Secretary of State, issued a warrant to four messengers ordering them:

> to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, the North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers. *Leach v. Three of the King's Messengers,* 19 How. St. Tr. 1001, 1004 (1765)

This warrant was general as to the persons to be arrested, the places to be searched, and the items to be seized. Since the messengers were given absolute discretion as to whom they should arrest and where they should search, they were not bound by any requirement of probable cause. The result was the arrest of 49 persons in three days. Finally they learned that Wilkes was the author of the pamphlet and arrested him and ransacked his house.

All the printers brought suit for false imprisonment. Chief Justice Pratt held the warrant illegal and sustained damages,[19] saying:

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[18]The *North Briton,* No. 45, retorted:

> Is the *spirit of concord* to go hand in hand with PEACE and EXCISE, through this nation? Is it to be expected between an insolent EXCISEMAN, and a *peer, gentlemen, freeholder or farmer* whose private house are now made liable to be entered and searched at pleasure? XV *Parliamentary History,* 1334 (1813)

It is ironic that the *Wilkes* case arose out of an attempt to use a general warrant to suppress a publication complaining of general warrants.

[19]Chief Justice Pratt sustained exemplary damages because of the threat to English liberty posed by the general warrant.

> But the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light which the great point of the law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting on the legality of this general warrant before them; they heard the

> To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour. *Huckle v. Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763)

Wilkes himself brought suit, and the Chief Justice again sustained a verdict against the defendants. He declared the warrant invalid, emphasizing the lack of probable cause and particularity.[20]

> The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicion may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it a rod of iron for the chastisement of the people of Great Britain. *Wilkes v. Wood*, 98 Eng. Rep. 489, 19 How. St. Tr. 1153, 1167 (1763)

King's Counsel, and saw the solicitor of the Treasury endeavor to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas that struck the jury on the trial; and I think they have done right in giving exemplary damages. *Huckle v. Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763). Cf. *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (Burger, C.J. dissenting).

[20]These decisions were greeted with great acclaim in England, and Chief Justice Pratt became one of the most popular men in the country. The city of London had him sit for his portrait by the famous artist, Sir Joshua Reynolds. When completed, the portrait was hung in Guildhall with an inscription by Dr. Johnson designating him the "zealous supporter of English liberty by law." Foss, *Judges of England*, 536 (1870), cited by *Lasson, supra* at 46.

The success of Wilkes encouraged John Entick to bring suit over a similar incident which occurred about a half year prior to the Wilkes incident. Again, it was an attempt of the Government to silence the press. Lord Halifax had issued a warrant to search for Entick, author of the *Monitor or British Freeholder* and seize him together with his papers. Thus the warrant, while being specific as to the person, was general as to the places to be searched and the items to be seized. In 1765, Pratt, now Lord Camden, held the general warrant invalid, stating:

> If this point should be decided in favor of the jurisdiction, . . . the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063 (1765).

The popular feelings aroused by these decisions were influential in forcing Parliament to act to abolish general search warrants. In the debates in the House of Commons, William Pitt made a classic declaration of the cherished right of privacy of English citizens.

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter, all his force dares not cross the threshold of the ruined tenament. Quoted in Cooley, I *Constitutional Limitations* 611 (8th ed. 1927)

In 1766 the House of Commons declared them illegal except when specifically authorized by Parliament. However, the power to issue writs of assistance to search for smuggled goods remained unimpaired.

Meanwhile, a similar struggle against general search warrants was occurring in the colonies, centering around the writs of assistance used by customs officers in the effort to

stamp out smuggling. These writs were even more odious than the general warrants of the *Wilkes* case, which were at least directed at the perpetrators of a particular offense. The writs of assistance were permanent search warrants placed in the hands of customs officials valid for the duration of the life of the sovereign; they could be used with unlimited discretion and were not returnable upon execution.

The writs were most frequently employed in the colony of Massachusetts, and it was there that the greatest opposition arose to their enforcement. In 1760, George II died and the existing writs of assistance expired. In the same year, Sir Francis Bernard, a Crown officer, became Governor of Massachusetts, and he appointed Thomas Hutchinson as Chief Justice, as one who would support the Crown in any controversy. The hearing for the issuance of new writs became the focus of political opposition to the trade laws. The attorney for the Crown, Jeremiah Gridley, flatly asserted that:

> Everybody knows that the subject has the privilege of house only against his fellow subjects, not against the King either in matter of crime or fine. Quincy, *Massachusetts Reports*, Gray's Appendix, 477 (1865)

The merchants engaged the noted lawyer James Otis to argue their cause. Otis characterized the writs as "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book." He stated that the writs were a power that placed the "liberty of every man in the hands of every petty officer," since custom officers were permitted to enter houses when they pleased upon bare suspicions without oath. He denounced the writs as destructive of the fundamental right of privacy and security of the home.

> This writ is against the *fundamental principles of law, the privilege of house.* A man who is quiet is as secure in his house as a prince in his castle, notwithstanding all his debts and civil procedures of any kind. Quincy, *supra*, at 471, from the notes of John Adams

This was a basic right whose security lay at the heart of the need for Independence. John Adams, in reference to Otis' remarks, stated "then and there the child Independence was born. In 15 years, namely in 1776 he grew to manhood, and declared himself free." Adams, *Life and Works of John Adams*, 247-48; see *Boyd v. United States, supra*. Chief Justice Hutchinson led the Massachusetts court in approving the issuance of the writs, but the forceful opposition that developed made their execution virtually impossible.[21]

This Court has taught that the opposition to the oppressive use of the search power was a major factor in the unification of the colonies against the English government. *Stanford v. State of Texas, supra*, at 481. When an angry Continental Congress on October 26, 1774, petitioned the King for redress of grievances, among those grievances listed was the abuse of the search power.

> The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information. Quoted in *Lasson, supra* at 75.

Against this history and their own direct experience with the writs of assistance, the former colonies sought to provide safeguards against abusive searches in the constitutions they enacted after the Revolution for their new state governments. The states of Virginia, Maryland, North Carolina,

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[21] During the Stamp Act Riot of 1765, angry colonists burned Judge Hutchinson's house to the ground in retaliation for his lead in granting the writs of assistance. Governor Bernard described the incident in a letter to the Lords of Trade.

> Last of all the . . . Chief Justice's house [was] destroyed with a savageness unknown in a civilized country. I mention him as Chief Justice, as it was in that character he suffered; for this connecting him with the Admiralty and Custom house was occasioned by his granting writs of assistance to the Custom house officers, upon the accession of his present Majesty; which was so strongly opposed by the Merchants that the Arguments in Court from the Bar lasted three days. The Chief Justice took the lead in the Judgment for granting Writs, and now he has paid for it. Quincy, *supra*, at 416, n.

Massachusetts, Pennsylvania, New Hampshire, and Vermont each wrote into its constitution a prohibition against general warrants.[22] The constitutions vary slightly in wording, but all sought to forbid abusive general searches by requiring that a search warrant could not be issued except upon probable cause given by oath and affirmation and must include a particular description of the person or things to be seized.

The wording of the Fourth Amendment reflects this history. The requirements that no warrant should issue "but upon *probable cause*, supported by oath or affirmation" and "*particularly describing* the place to be searched, and the persons or things to be seized" were thought sufficient and necessary to forever proscribe the use of general warrants by the new national government.

This Court has been steadfast in its commitment to enforcing these historic commands of the Amendment, the "true and ultimate expression of constitutional law," *Boyd v. United States*, 116 U.S. at 626. From *Boyd* to *Coolidge* in this last term, this Court has faithfully enforced those mandates of particularity and probable cause which history has written into the heart of the Fourth Amendment. Today, the Government asks this Court to ignore these mandates, to ignore our history, to authorize those instruments of "oppression and tyranny," *Boyd v. United States*, the general warrant and writ of assistance which the Fourth Amendment was written to forever proscribe.

The technology of electronic surveillance was, of course, unknown in the eighteenth century. Yet the present practices of the Justice Department, for which approval is sought in this Court, embody the very characteristics of the general warrant the Fourth Amendment was intended to abolish. Since the searches are not conducted to obtain evidence for the prosecution of criminal acts (Government's Brief at 16, 19), there necessarily can be no compliance

[22] The provisions of the state constitutions are quoted *infra* at p. 81, n. 24.

with the requirement of probable cause. These investigative searches for the purpose of "gathering intelligence information for the President" (Government's Brief at 19) by definition do not comply with the requirement of particularity.[23] No return is made to a judge of the evidence obtained.

In the area of electronic surveillance this Court has been no less the jealous guardian of the Fourth Amendment.

Mr. Justice Clark, writing for this Court in *Berger v. New York*, 388 U.S. 41 (1967), declared invalid a New York statute authorizing wiretapping because its lack of proper standards permitted general searches pursuant to general warrants. *Id.* at 44. The Court held that electronic surveillance can only be constitutionally authorized upon a showing of probable cause that a particular crime is or has been committed.

> The purpose of the probable-cause requirement of the Fourth Amendment [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed. . . . *Id.* at 59.

In the area of electronic surveillance this Court has recognized the special importance of strict adherence to the Fourth Amendment's requirement of particularity.

> The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in *Osborn v. United States*, 385 U.S. 323 (1966), the indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth

[23] The nature of these searches is best illustrated by the description of a single "surveillance" in the Government's Brief at 30-31, n. 13. The surveillance continued over a fourteen-month period in which at least 952 phone calls, and most likely far more, were overheard and recorded.

> Amendments, and imposes a heavier responsibility on this court in its supervision of the fairness of procedures. . . . at 329, n. 7. *Berger v. New York, supra* at 55-56

The political espionage for which the Attorney General openly now seeks sanction is plainly and simply a system of warrantless searches and seizures without any showing of probable cause and without any showing of particularity. In the words of James Otis it is "against the fundamental principles of the law," and it truly, as William Pitt said on the floor of the Commons, "abandons the liberty" of all the people. To permit the reintroduction into American life of this system of spying on citizens would be, in the words of James Otis before the Massachusetts Court, tolerating "the worst instrument of arbitrary power."

2. *The doctrine of "inherent powers" does not sustain the Executive's attempt to suspend in its own judgment the constitutional mandates of the Fourth Amendment protecting the liberties of the people.*

As we have pointed out earlier, in order to justify this awesome reach for power to brush aside the commands of the Fourth Amendment, the government has once again summoned up the notion of some inchoate "inherent" power in the Executive which authorizes the suspension of constitutional requirements in his sole judgment that the "national interest" in some way requires this. Cf. *Youngstown Sheet & Tube Co. v. Sawyer, supra.*

As the Court below so sharply pointed out:

> The government has not pointed to, and we do not find one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General or federal law enforcement from the restruction of the Fourth Amendment in the case at hand.

* * *

> Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (App. 59. (1952) . . .

In order to sustain this position, the Government has reached far afield into the cases concerning the President's war-making and foreign relations powers searching for justification for the warrantless general searches of citizens involved in this appeal. The Court of Appeals disposed decisively of the Government's reoccurring litany of these cases:

> Decision of six of the cases relied upon is based upon the war powers or foreign relations powers of the president—*Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *United States v. Pink*, 315 U.S. 203 (1942); *Totten v. United States*, 92 U.S. 105 (1875). None of these cases are criminal cases. None of these cases involve the Fourth Amendment. None of them involved wiretapping. These cases we deem totally inapplicable to the instant case where the Attorney General has certified that we deal with a domestic security problem. (App. at 45)

This claim of "inherent" power masks the real issue, for the only acceptable test is as this Court has taught, whether "the President's power . . . stem(s) either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1953). The Court below found *Youngstown* to be depositive of the inherent powers claim. The words of Mr. Justice Black for the Court are wholly governing here:

> It is clear that if the President had authority to issue the order he did, it must be found in some

provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. *The contention is that presidential power should be implied from the aggregate of his powers under the Constitution.* Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities. Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

* * *

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for

> *freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.* 343 U.S. at 387-89 (Emphasis added)

The Executive attempts to justify its extravagant claims of power to override the commands of the Fourth Amendment by asserting as it has in the past the need of the nation to "preserve" itself. The Government argues:

> The governmental objective here is of grave importance, and the Constitution should not be construed to "withdraw from the Government the power to guard its vital interests" in the area. *United States v. Robel*, 389 U.S. 258, 267; see also *Aptheker v. Secretary of State*, 378 U.S. 500, 509. Government's Brief at 26.

In the very cases the Executive relies upon for its justification, this Court rejected the "talismanic," cf. *United States v. Robel, supra,* use of "national security" or the "war power." In striking down a statute regulating employment in defense plants, this Court taught that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *Id.* The Court went on to say:

> . . . this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to protect such a goal. Implicit in the term "national defense" is the notion of defending those values and ideas which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideas have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of Association—which makes the defense of the Nation worthwhile. 389 U.S. at 264.

Aptheker v. Secretary of State, supra at 508, is in complete accord.

Alarms by the Executive Branch of threats to national security have been repeatedly sounded as different administrations have served their terms. The words of the Bill of Rights would have become hollow rhetoric long ago if this Court had acceded to the fears of the moment raised by past administrations to justify their demands for more power. At critical moments in our history, this Court has had to fulfill its unique constitutional responsibility to rise above political exigencies of the period in order to preserve the constitutional government of the nation. *Marbury v. Madison, supra.* Cries by the Executive of threats to "national security" by reason of a particular danger of "subversion" change with chameleon-like facility with each decade. Some such instances of hysteria or excess of zeal would best be forgotten if it were not for the need to place the Executive's fears of today in historical perspective.

In the aftermath of the crisis generated by the Civil War, the overreaching of executive authority came sharply before this Court in a landmark case, *Ex parte Milligan,* 4 Wall. 2 (1866). The Executive had sought to avoid the regular procedures of resort to the judicial branch in bringing to justice those who in his opinion threatened the national security. Even in regions remote from military operations and where the operation of federal courts continued despite the war, citizens were arrested by zealous military commanders for "disloyal practices affording aid and comfort to rebels" and in accordance with the President's proclamation of September 24, 1862, were tried and sentenced by military tribunals. One L. P. Milligan was tried before a military commission in Indiana and convicted of conspiracy to release and arm rebel prisoners and to march with these men into Kentucky and Missouri in order to cooperate with rebel forces there for an invasion of Indiana. In April 1866, this Court issued its historic decision in *Ex parte Milligan, supra,* unanimously holding that the military tribunal authorized by the President was unlawful. Mr. Justice Davis, speaking

for the Court in eloquent words, proclaimed the inviolability of the Bill of Rights even when the nation was involved in a civil rebellion:

> Time has proven the discernment of our ancestors; for even these provisions [of the Bill of Rights], expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of Constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. 4 Wall. at 295 (Emphasis added).

This Court reaffirmed that the Constitution was the Supreme Law of the land, and that its provisions could not be suspended by the Executive upon his own determination of "necessity" to protect the national security, even in time of war.

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this

> right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of *habeas corpus. Id.* at 297.

The words of Mr. Justice Davis are powerfully appropriate here. The Executive today claims the power to set aside time honored mandates of the Constitution which protect individual liberty when in its own judgment the national necessity requires it. The answer to this claim is the answer of the Court in 1866: "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall. at 295.

This century once again witnessed a frightening example of the Executive's invocation of the national security as justification for destruction of individual liberty. In January, 1919, Attorney General A. Mitchell Palmer launched a gigantic "Red hunt," marked by mass arrests without challenge by habeas corpus, permitted hasty hearings and prosecutions entirely lacking in the rudiments of due process, and mass deportations of aliens suspected to be Communists. In habeas corpus proceedings arising out of the notorious "Palmer Raids" in which thousands of suspected aliens and

Communists were seized and detained under Executive order, Felix Frankfurter, then a professor at Harvard Law School, and Professor Zechariah Chafee appeared as amicus curiae arguing that the arrests, detentions, and deportation hearings were unlawful. After hearing extensive evidence, the Court found that the Justice Department had deliberately sought to magnify the supposed threat to the national security posed by these aliens in order to justify the procedures used in the public eye.

> *Pains were taken to give spectacular publicity to the raid, and to make it appear that there was great and imminent public danger, against which these activities of the Department of Justice were directed.* The arrested aliens, in most instances perfectly quiet and harmless working people, many of them not long ago Russian peasants, were handcuffed in pairs, and then, for the purpose of transfer on trains and through the streets of Boston, chained together. . . On detraining at the North Station, the handcuffed and chained aliens were exposed to newspaper photographers and again thus exposed at the wharf where they took the boat for Deer Island. *The Department of Justice agents in charge of the arrested aliens appear to have taken pains to have them thus exposed for public photographing.* *Colyer v. Skeffington*, 265 F.17, 44 (D. Mass. 1920) (Emphasis added).

The federal court ordered the release of virtually all the aliens ordered to be deported because the proceedings were "vitiated by lack of due process of law." *Id.* at 79. The "Palmer raids" are generally acknowledged to have been a sad chapter of our history. If the theories of the present Executive, the "incantation" of national security, cf. *United States v. Robel, supra,* is permitted once again to become a "talisman" in whose presence the Constitution "fades away and disappears," *Coolidge v. New Hampshire, supra,* then in truth the "security of the Republic," *Stromberg v. California,* 283 U.S. 359 (1951) will be imperiled.

Unhappily, in recent times this Court has had to reassert the supremacy of the Constitution and reject the shibboleth

of "national interest" as a magic wand which can wave away the "inconveniences" of the Bill of Rights.

In *Stanford v. Texas, supra*, this Court invalidated a search by Texas law enforcement officers of the home of a leader of the Communist Party. The Texas statute and the actions of the State officers pursuant to that law can best be described as a wholesale incursion into the liberties of Mr. Stanford. The officers, in the name of "national security" seized everything within sight including the writings of Pope John XXIII and of the late Mr. Justice Black. Mr. Justice Stewart, speaking for a unanimous Court found the words of the Fourth Amendment to be as "precise and clear" as when they were written:

> The Constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.
>
> * * *
>
> Two centuries have passed since the historic decision in *Entick v. Carrington*, almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King. 379 U.S. at 485-86.

As we have pointed out earlier, the Court has had the occasion in recent years to reassert that invocation of national security does not justify the abrogation of the right of political association, *United States v. Robel, supra* at 264, or the right to travel, *Aptheker v. Secretary of State, supra* at 508 (1963).

At the end of the last term of this Court, this Administration again sought to limit vital constitutional rights of the people in the interest of "national security." In *New York Times Company v. United States*, 403 U.S. 713 (1971), the Executive framed a similar demand for abridgment of the First Amendment rights of American citizens. The Solicitor General, "carefully and emphatically stated":

> Now, Mr. Justice [Black], your construction of *** [the First Amendment] is well known and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious "no law" does not mean "no law" and I would seek to persuade the Court that that is true. *** [T]here are other parts of the Constitution that grant power and responsibilities to the Executive and *** the First Amendment was not intended to make it impossible to function or to protect the security of the United States. *Id.* at 718.

Mr. Justice Black then observed that the Government's claim was founded on the "inherent powers" of the President to preserve the national security, *Id.*, the precise argument once again made in this case. Mr. Justice Black, in his last opinion for this Court, reminded the Nation that:

> The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. *Id.* at 716 (concurring opinion of Black, J.)

and forthrightly rejected the "inherent power" argument of the Government:

> To find that the President has the "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the

very people the Government hopes to make secure. *Id.* at 719.

The decision of the court below is fully within the spirit and sweep of the decision and opinions of this Court last term in *New York Times, supra.* In the tradition of *Marbury v. Madison, Ex parte Milligan, Youngstown Sheet & Tube Co., Powell v. McCormack,* all *supra,* the tradition Mr. Justice Clark called the "finest tradition of this Court," *Baker v. Carr,* 369 U.S. 186 (1962), the Court of Appeals firmly and with courage rejected the claim of the Executive to "inherent power" to suspend the mandates of the Fourth Amendment in the name of the threat of "domestic subversion." The words of the Court below echo the resolute words of this Court throughout its history when faced with similar challenges to the fundamental principle that this is a government of law and not men.

> But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. . . . We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire. App. at 62-63.

3. *The claim of power of the Executive offends against the fundamental principles of separation of power and limited sovereignty established in established in the first days of the Republic.*

With deep insight the Court below recognized that this case "has importance far beyond its facts or the litigants concerned," that it touches, as this Court said in *Reynolds v. Sims,* 377 U.S. 533 (1964), the "bedrock of our political system." In the most profound way this case calls into question the fundamental principles of the Republic, the

continuation of a government of limited and enumerated powers, a government of separate powers, a government in which the written fundamental law is supreme over men in high places who would place their will and their judgment above the guarantees of liberty which the law sets forth.

As the great Chief Justice said in *Marbury*, the written Constitution set forth the limits, the boundaries of power so that "these limits may not be mistaken or forgotten. . . ." I Cranch at 175. Any "doctrine" which would elevate any branch of the government above the restrictions of the written law, would in Chief Justice Marshall's words "subvert the very foundations of all written Constitutions." *Id.* at 178. The history of the country, its earliest days, illuminate this teaching of the first Chief Justice. This history reveals that the structure of the new government, based as it was upon the principle of separation of powers, and limited by a Bill of Rights, was constructed for the very purpose of frustrating claims to excessive power of the nature asserted here by the present Executive.

The founders of our country enacted a Constitution vesting a new federal government with certain enumerated powers and creating three coordinate branches of government to share and check the administration of these powers. No absolute authority was lodged in any man or institution. Each branch of government was vested with limited powers derived from the Constitution which was itself the supreme law of the land.

James Madison, one of the drafters of the original Constitution and a foremost proponent of its ratification, argued that the provisions for separation of powers were designed to ensure that the Government indeed exercised its authority within the prescribed bounds.

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly an overruling influence over the others in the ad-

> ministration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectively restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. *Federalist Papers* No. 48, p. 308 (Mentor Books, 1961).

Madison quoted Thomas Jefferson's explanation of why the Virginia Constitution provided for a separation of powers, as further authority for the Constitution's provisions for separation of powers. The reason was to provide effective safeguard against tyranny.

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. Thomas Jefferson, *Notes on the State of Virginia*, p. 195, quoted in Federalist Paper No. 48, p. 310-11.

Nonetheless, a bitter outcry arose in the former colonies when the original Constitution failed to contain a bill of rights restraining the government from abridging individual liberties of citizens in the exercise of its powers. Many opposed ratification for this reason.

James Madison explained the lack of a bill of rights by saying that the new government was one of specific and enumerated powers, and since the powers of the government were limited by enumeration, it would be absurd and

unnecessary to add an additional section specifying what it could not do. Yet, later Madison himself was to concede the need for a bill of rights:

> I do conceive that the Constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. *Annals of Congress*, 1st Congress, 1st Session, at 432.

This lack of restraint upon the government afforded by the Constitution was the subject of attack by many newspapers and pamphlets during the period before ratification. In his "Letters of a Federal Farmer," Richard Henry Lee noted the need for a bill of rights (including protection against unreasonable searches) by stating:

> [T]here are .... essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrant, warrants not found on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons. R. H. Lee, "Letters of a Federal Farmer," Letter IV, in Ford, *Pamphlets on the Constitution*, 315 (1888).
>
> Our countrymen are entitled to an honest and faithful government; to a government of laws and not of men; . . . I wish to see these objects secured; and licentious, assuming, and overbearing men restrained; if the constitution or social compact be vague and unguarded, then we depend wholly upon the prudence, wisdom and moderation of those who manage the affairs of government; or on what, probably, is equally uncertain and precarious, the success of the people oppressed by the abuse of government, in receiving it from the hands of those who abuse it, and placing it in the hands of those who will use it well. *Id.*, Letter V, at 324.

In the ten-month struggle for ratification in the state conventions, absence of a federal bill of rights became the strongest point of attack upon the Constitution by the Antifederalists. In examining the debates in the state ratifying conventions, it first must be noted that many of the states had their own Bills of Rights including provisions against general warrants.[24]

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[24]That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. (Virginia Bill of Rights of 1776)

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or other property, not particularly described, are contrary to that right, and ought not to be granted. (Pennsylvania Constitution of 1776)

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the persons in special—are illegal, and ought not to be granted. (Maryland Declaration of Rights of 1776)

That general warrants—whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offences are not particularly described, and supported by evidence—are dangerous to liberty, and ought not be granted. (North Carolina Declaration of Rights of 1776)

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws. (Massachusetts Constitution of 1780)

In the Virginia State Convention of 1788, Patrick Henry pointed to the Virginia State Constitution which did contain a bill of rights and warned that the new federal constitution would destroy the liberty of the people.

> In the present Constitution [of Virginia] they [the authorities] are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, etc. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitations of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds. Elliot, *Debates on the Adoption of the Federal Constitution*, III, at 448-449.

Virginia ratified the Constitution by a close vote of 89-79, but accompanied the ratification with a statement, "that there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following . . ."[25]

The New Hampshire Constitution of 1784 repeats the above provision of the Massachusetts Constitution of 1780. The Vermont Constitution of 1786 repeates the above provision from the Pennsylvania Constitution of 1776.

[25]The proposed list of amendments included the following: Fourteenth, that every freeman has a right to be secure from all unreasonable searches and seizures to his person, his papers, and his property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon Oath . . . of legal and sufficient cause are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not be granted.

New Hampshire ratified with the following protective provision:

> And as it is the Opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good People of the State and more Effectually guard against an undue Administration of the federal Government.

Ratification was secured in the populous states of Massachusetts and New York, only with similar inclusion of proposed amendments and some insurances by the Federalists of their eventual adoption.[26] Kelly & Harbison, *The American Constitution: Its Origins and Development*, 148-166 (1963). North Carolina refused to ratify, but instead adopted a resolution calling for the adoption of a bill of rights.[27]

Thus, with the desires of many states so expressed, James Madison, at the opening session of the first Congress, took the initiative in advocating amendments, including what was to become the Fourth Amendment, limiting the Government's power to intrude upon individual and political rights.

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[26]New York ratified with the following declaration: Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the Explanations aforesaid are consistent with the said Constitution, and in confidence that the Amendments which shall have been proposed to the said Constitution will receive an early and mature Consideration.

Massachusetts ratified and repeated the opinion enunciated by New Hampshire.

[27]That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, Together with Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before the Congress, and the Convention of the States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration previous to the Ratification of the Constitution aforesaid, on the part of the State of North Carolina.

> I believe that the great mass of the people who oppose it [the Constitution] disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary. *Annals of Congress*, 1st Congress, 1st Session, at 433.

In September, 1789, Congress submitted the proposed amendments to the States, and in November, 1791, ratification was completed making them part of the Constitution.[28]

The history of the ratification period shows an overriding concern by the Framers to delineate clearly the scope of governmental authority and to protect individual freedoms by imposing restraints on its exercise. There is no room here, as suggested by the present Executive, for an assertion of any "fundamental" or "inherent" authority of the federal government or any part of it to erode or ignore these restraints. It is against this history that the claims of the Government must be measured.

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[28]It should be remembered that the enactment of the Bill of Rights solidified support for the Constitution and served to strengthen the new federal government. As a result, North Carolina and Rhode Island ratified the Constitution and joined the Union. The factions adverse to the federal government lost their strength and unity. The significance thereafter of the Bill of Rights to the viability of the new Union has been thus described:

> The reaction to the adoptment of the amendments was immediate. The popularity of the Constitution increased tremendously. As history has shown, it was indeed fortunate for the new Union, which was soon again torn with so much dissension, that this should be so. The leaders who had opposed the Constitution were still dissatisfied, for they had insisted upon changes in its framework as well. But their strongest bid for popular support was gone. They could no longer appeal to that defect in the new regime which the public in general could most appreciate and understand. Without this popular support, the backbone of forces arrayed against the Constitution was broken. *Lasson, supra*, at 104-5.

The Executive's bid for uncontrolled power to conduct domestic espionage against dissident citizens without regard for limitations of the Fourth Amendment flies in the face of the most fundamental traditions of the nation. It contradicts the most elementary lessons of our history.

The government's assurances that it will not abuse the awesome and unchecked powers it seeks here (Government's Brief at 35) are also answered by our history. The Framers were well aware that governmental power is always subject to abuse and for that reason limited its exercise by the Bill of Rights and the checks created by its division among the three branches of government. See *New York Times v. United States, supra,* (opinion of Mr. Justice Black). In this respect, the remarks of Elbridge Gerry, a distinguished delegate from Massachusetts to the Philadelphia Constitutional Convention are instructive:

> This people have not forgotten the artful insinuations of a former Governor, when pleading the unlimited authority of parliament before the legislature of Massachusetts; nor that his arguments were very similar to some lately urged by gentlemen who boast of opposing his measures, 'with halters about their necks.'
>
> We were then told by him, in all the soft language of insinuation, that no form of government of human construction can be perfect—that we have nothing to fear—that we had no reason to complain—that we had only to acquiesce in their illegal claims, and to submit to the requisition of parliament, and doubtless the lenient hand of government would redress all grievances, and remove the oppressions of the people:—Yet we soon saw armies of mercenaries encamped on our plains—our commerce ruined—our harbours blockaded—and our cities burnt. . . . Let the best informed historian produce an instance when bodies of men were entrusted with power, and the proper checks relinquished, if they ever found destitute of ingenuity sufficient to furnish pretences to abuse it. And the people at large are already

> sensible, that the liberties which Americans claimed, which reason has justified, and which have been so gloriously defended by the swords of the brave; are not about to fall before the tyranny of foreign conquest; it is native usurpation that is shaking the foundations of peace, and spreading the sable curtain of despotism over the United States. Gerry, "Observations on the New Constitution," in Ford, *supra* at 16.[29]

The words of Elbridge Gerry are eloquent answers to the assertion of today's Executive that power should not be denied to him because of the fear of abuse. (Government's Brief at 35). A people, to remain free, must never permit "the proper checks [to be] relinquished," lest, in his impassioned words, the "sable curtain of despotism" be spread "over the United States."

The men who wrote our Constitution were aware of the tendency of rulers to equate dissent against their policies with sedition and treason. No less were they mindful of the need to empower the new government with the means of self preservation in the difficult years following the Revolution. "The Constitution was written so as to strike a balance between the protection of political freedom and the protection of the national security interest. To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy." *United States v. Smith* (C.D. Cal. No. 4277-CD, Jan. 8, 1971). (Ferguson, J.). Benjamin Franklin expressed this philosophy in now familiar words:

> They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety. *Historical Review of Pennsylvania* cited in J. Bartlett, *Bartlett's Familiar Quotations* 227 (C. Morley & L. Everett ed. 1951).

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[29] Gerry was speaking of the colonial Massachusetts experience with the hated writs of assistance under the governorship of Francis Bernard.

And as Mr. Justice Brandeis wrote in words which have become immortalized in opinions of this Court, "those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Whitney v. California*, 274 U.S. at 377 (concurring opinion).

The Fourth Amendment exemplifies the Framer's considerations of the proper balancing of the interests of liberty and safety. The Government is enabled to obtain authorization of a search upon a proper showing, but the warrant requirement stands as a protection of the citizen against arbitrary invasion of his or her privacy. Those who won our independence by revolution, in Justice Brandeis' words, were not cowards.

The men who wrote our Constitution for the people they represented determined to take certain risks inherent in a free democracy by imposing restraints on the new government by the Bill of Rights, and in doing so they actually strengthened the security of the nation. See *Stromberg v. California, supra.*

We urge the Court to consider carefully this history in deciding this case. In recent years, large numbers of American citizens have come to question whether the United States has abandoned its historic ideals of liberty and self-determination in the seemingly endless prosecution of the Vietnam war and repression of those who dissent against government policies. A decision by this Court affirming the traditional guarantees of the Fourth Amendment and the subordination of the Executive Branch to the Constitution and the rule of law would be an essential reaffirmation of the principles of liberty born in "revolution on this Continent," *Coolidge v. New Hampshire, supra,* at 455, and would, in the deepest sense of the word, strengthen the Republic.

For this Court to reaffirm the bounds and limits which the written Constitution places upon the Executive would be to "preserve" the system of government in the original

meaning of the Founders of the nation. As James Madison placed it in words perhaps uncommonly blunt:

> "The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained; but especially that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority and are tyrants." Madison, Memorial and Remonstrance, Vol. II, Writings of Madison, 183-191 (A. Hunt, ed. 1901).

Upon this Court has been placed the "ultimate responsibility," *Marbury v. Madison, Powell v. McCormack, supra,* to guarantee that a branch of government, not even the Executive, *Youngstown Sheet & Tube Co. v. Sawyer, supra,* "be suffered to overleap the great barrier which defends the rights of the people," *Madison, supra.* In this lies the true protection of the Republic.

The preservation of the strength and security of this nation has never rested in the hands of a few men in public office; it lies in the freedoms of the people as enacted in a Constitution and its Bill of Rights. When America rejected colonial tyranny and George the Third, it assumed certain risks as a small price for freedom.

In the words of the Court below:

> It is strange indeed that in this case the traditional power of sovereigns like George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign. App. 60.

4. *The last minute efforts of the Government to interject considerations of "foreign security" into this case are totally unsupported by the record and must be rejected as a desperate attempt to camouflage the illegality under the Fourth Amendment of the warrantless surveillances involved.*

As a last minute effort to sustain the legality of these wiretaps the Executive argues in this Court that because a distinction between foreign and domestic considerations is artificial and insupportable, "both on the facts of this case and in most (if not all) national security cases within the congressionally defined areas of concern," a prior judicial warrant is not required by the Fourth Amendment in the area of "domestic security" problems. Government's Brief, at 30-31. To arrive at this startling conclusion, the Executive reasons that, "[f]oreign and domestic intelligence activities are interrelated aspects of the broad function of protecting national security." *Id.* at 31. This argument is interwoven throughout the Government's brief (e.g., Government's Brief at 16, 17, 18, 20, 23, 24, 27, 29, 30-31) in an attempt to buttress as a last resort the Executive's unprecedented claim in this case that domestic "national security" electronic surveillance without prior judicial sanction is permissible under the Fourth Amendment.

1) This contention of the Government that foreign security considerations are involved in this case is in direct contradiction to the Government's own characterization of the issues in the course of the litigation. The affidavit of the Attorney General filed in the District Court explicitly states that the electronic surveillances at issue were directed toward *domestic* organizations. The taps:

> were being employed to gather intelligence information deemed necessary to protect the nation from *attempts of domestic organizations to attack and subvert the existing structure of the Government.* The records of the Department of Justice reflect the installation of these wiretaps has been expressly approved by the Attorney General. Affidavit of At-

torney General App. at 20-21 at para. 3 (emphasis added)

Thus, the Government's own stated "purpose" for conducting the surveillance in the first place completely contradicts its present efforts to interject the issue of "foreign security." The Government's after-the-fact characterization of its own illegal activities can scarcely control the legal analysis of the situation. Cf. *United States v. Stone*, 305 F.Supp. 75, 80 (D.C. D.C. 1969). See also *Cole v. Arkansas*, 333 U.S. 196 (1948).[30]

The courts below accepted the sworn statement of the Attorney General at face value and properly concluded that the issue in this case concerns only the President's alleged powers in domestic security matters. (E.g., App. at 30-31, 47, 51, 63-64).

The Government has at this late stage in the proceedings attempted to interject the issue of foreign security electronic surveillance into this case by referring the Court to the record in the *Ferguson* case, now pending before this Court on a petition for a Writ of Certiorari, *Ferguson v. United States*, No. 71-239. (Government's Brief at 30, n.13). It is not clear from this footnote in the Government's Brief whether the Government is claiming that "the surveillance in question" (as to defendant Plamondon) is the same surveillance referred to in the next paragraph of the footnote described as the "additional record of conversations overheard during this surveillance," *Id.* at 30, n. 13.

Of course, the logs in both cases are available only to the Government and this Court so respondents cannot make their own factual determination as to the connection, if any, between the *Plamondon* logs and the record in the *Ferguson* case. But whether the Government or this Court should

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[30]It would totally violate the fundamental concept of notice guaranteed by the Due Process Clause of the Fifth Amendment for the Government to be permitted to retroactively restate here at the final appellate stage its alleged purpose in engaging in the electronic eavesdropping.

consider the surveillances in *Ferguson* and *Plamondon* to be the same surveillance or not, several alternative conclusions flow from the Government's statements of fact which are equally fatal to its own position.

a) The Attorney General's affidavit in the *Ferguson* case, *United States v. Smith, supra,* describes the "purpose" of the surveillance in question as being to eavesdrop on a domestic organization which may "use unlawful means to attack and subvert the existing structure of government" (Appendix A to this Brief). The Government has therefore attempted to alter its own prior "purpose" which was to snoop on a domestic organization, compare *United States v. Stone, supra,* by reforumlating its "purpose" as one involving foreign security. The Executive has sought to accomplish this redefinition of the *Ferguson-Smith* litigation by attempting to file further logs in the Ninth Circuit Court of Appeals, Government's Brief at 30, n. 13, a highly suspect practice. Cf. *Cole v. Arkansas, supra.* This was a bootstrap operation at best for the *Ferguson* case and when used to bolster a record of surveillance which occurred many months earlier in this case, a surveillance already described as having a "domestic" security "purpose" by the Attorney General's own sworn affidavit, it constitutes a twice removed effort at retroactively creating a record of foreign security surveillance where none in fact originally existed.

b) In the alternative, if the Court examines the logs in the *Ferguson* and the instant case and finds that they are *not* of the same surveillance, then the *Ferguson* record is irrelevant to the Court's consideration here of the legality of the domestic security surveillance in the *Keith* case.

c) It seems probable that the Executive is characterizing the surveillance revealed in note 13 as one continuing surveillance. If this is so, the Executive has admitted to a surveillance program of extraordinary duration and enormous breath as "This surveillance" and "the surveillance in question." If it is describing simply *one* "surveillance," the overbreadth of this program, its lack of particularity and its rejection of any concept of probable cause, renders it

wholly violative of the First and Fourth Amendments. See Points I A, B, (1), (2) *supra*. Compare the Government's Brief at 31, n. 13 indicating *952* overheard phone calls in a fourteen-month period of this surveillance with Government's Brief at 27, n.10 alleging only *36* national security telephone surveillances operated by the FBI in 1970.

2) The Government suggests that this Court has left open the question of the legality of warrantless *domestic* national security surveillance of the sort at issue here. This is a total misstatement of the decisions of this Court. If there is anything at all left undecided by the Court in its determinations of the illegality of warrantless electronic surveillance, it is only the narrow and limited question of the legality of warrantless *foreign security* surveillance.

Even as to this narrow question, the Court has never either acknowledged or ruled upon the power of the President to conduct warrantless foreign security surveillance. See *Giordano v. United States*, 394 U.S. 310, 314 (1969), *Katz v. United States*, *supra*, *United States v. Clay*, 430 F.2d 165, 170 (5th Cir. 1970), reversed on other grounds 403 U.S. 698 (1971).[31] Therefore, the Government's premise that "a warrant would not be required for surveillance involving foreign intelligence operations . . .", Government's Brief at

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[31] The position of the Government that warrantless electronic surveillance of domestic organizations should be sanctioned by this Court is contrary to the standards adopted by the American Bar Association in 1971 (ABA Project on minimum standards for Criminal Justice, Standards Relating to Electronic Surveillance, Sec. 3-1 (Final Draft 1971)).

The standard defines national security as external to foreign affairs (Tent. Draft at 121, June 1968). The Committee rejected any inherent power in the President to deal with domestic subversive groups. Tent. Draft, *supra*.

When the standard was adopted by the House of Delegates, former American Bar Association President, Lewis Powell, Jr. remarked:

> "The standards with respect to subversion . . . do not apply to domestic subversion—only to foreign attack." Reported in 8 Cr.L. Rep. 2371, 2372 February 17, 1971.

30, is not based on the decisional law of this Court and does not support its bootstrap argument that "Foreign and domestic intelligence activities are interrelated aspects of the broad function of protecting national security," *Id.* If anything, the few lower court cases cited by the Executive, *United States v. Clay, supra, United States v. Stone, supra, United States v. O'Baugh,* 304 F.Supp. 767 (D.C. D.C. 1969), *United States v. Butenko,* 318 F.Supp. 66 (D. N.J. 1970), which hold warrantless foreign security wiretaps to be legal, all carefully restrict the holding of legality to narrowly defined foreign security surveillance. See *Giordano v. United States, supra,* Mr. Justice Stewart concurring.

An inquiry as to precisely what has been left open by this Court must start with the dissenting opinion of Mr. Justice White in *Berger v. New York, supra.* Mr. Justice White believed that the Court's far-reaching opinion in *Berger, supra* would, *sub silentio,* determine the unreasonableness and illegality of the Government's program of warrantless foreign security electronic surveillance for which the Executive Branch was then seeking legislative sanction from the Congress. *Id.* at 107, 116.

He wrote of the proposed legislation aimed at protecting against the "grave threat to the privacy and security of our citizens," posed by unregulated wiretapping. *Id.* at 112. He urged the Court, "to deal with the facts of the real world" in determining the reasonableness of wiretaps under the Fourth Amendment. *Id.* at 114. These facts included a recognition that the Government at the time of the decision in *Berger, supra,* was proposing legislation to the Congress prohibiting most wiretapping, but the prohibitions of the proposed bill (H.R. 5386 and S. 928 §3) did not apply to interceptions in so-called foreign security cases. Mr. Justice White described the Bill:

> Apparently, under this legislation, the President without court order would be permitted to authorize wiretapping or eavesdropping "to protect the nation against actual or potential attack or other hostile acts of a foreign power or any other serious

> threat to the security of the United States or to protect national security information against foreign intelligence activities. *Id.* at 115.

According to Mr. Justice White, the proposed foreign security exception would allow the Attorney General to exercise the President's powers in wiretapping, in cases like "sabotage and investigations of organizations controlled by a foreign government." *Id.* at 115. Even such foreign security surveillance would be for purposes of investigation alone and not for prosecution. Information thereby obtained would not be admissible into evidence in a criminal proceeding. *Id.* at 116. Mr. Justice White believed the Court's decision in *Berger* could well determine the question of the reasonableness, *sub silentio*, of such foreign security surveillance.

In its subsequent opinion in *Katz v. United States, supra* at 358, n. 23, the Court, in the opinion of Mr. Justice Stewart, made it clear that the *only* issue remaining open was the narrow question of the legality of foreign security surveillance. Mr. Justice White expressed his views (concurring opinion at 364) and Justices Brennan and Douglass disagreed, *Id.* at 359. We are reminded as to what issue is left open in *Berger* and *Katz* by Mr. Justice Stewart in *Giordano v. United States, supra.*

> Finally, the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance *relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. MR. JUSTICE WHITE has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment,* 'if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.' While two members of the Court have indicated disagreement with that view, the issue re-

> mains open. 394 U.S. at 314 (concurring opinion of Stewart, J.) (Emphasis added, footnotes omitted)[32]

The decisions of this Court thus demonstrate that all that remains "open" is the narrow question of legality of warrantless electronic surveillance relating to the gathering of foreign intelligence information. It has never been suggested by this Court or any of the Justices that the kind of domestic security surveillance engaged in here by the Attorney General of "domestic organizations" which may "attempt" to "attack and subvert the existing structure of the government," Affidavit of Attorney General, App. 20, has in *any* way been left open by the decisions of this Court.

3) The Government has relied upon a number of cases dealing with the war power as authority for its argument that the President's power in the foreign relations area is too intertwined with domestic issues as to make distinction impossible. These cases are urged to support the proposi-

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[32] It has been suggested that Mr. Justice White may have reconsidered his views as to the constitutionality of even the narrow kind of electronic surveillance "relating to the gathering of foreign intelligence information," *Giordano v. United States, supra,* that Mr. Justice Stewart suggests may have been left open by the Court. Mr. Justice White, in his opinion for the Court in *Alderman v. United States, supra* at 184 ordered disclosure to a defendant in a criminal case of all surveillance logs gathered illegally including those where disclosure may involve the national security. The absolute disclosure requirement of *Alderman* even in the narrow area of surveillance "relating to the gathering of foreign intelligence information" is predicated on the illegality of such surveillance and as such may be a rethinking of the original reservations in this regard by Mr. Justice White. Judge Ferguson suggested in *United States v. Smith,* 321 F.Supp. at 426, *supra,* that:

> In *Alderman,* Justice White suggested that in light of the disclosure requirement the government might have to dismiss certain cases "in deference to national security." This seems to suggest that he may have reconsidered this initial position, since under it national security cases would be almost *per se* lawful, and therefore not subject to the disclosure requirement.

Cf. also n. 13 in the *Alderman* opinion, 394 U.S. at 181.

tion that "This Court has recognized the President's authority and duty to collect and utilize intelligence information so that he can properly fulfill his constitutional responsibilities." Government Brief at 16. But none of the cases cited by the Government (See n. 4, Government's Brief) involve the collection and utilization of intelligence information at the expense of fundamental rights of citizens guaranteed by the Constitution.[33]

Moreover, none of these decisions support the extraordinary proposition advanced by the Executive in this case that the admittedly broad powers of the President in the conduct of foreign affairs, cf. *United States v. Curtiss-Wright Corp., supra,* are so intermingled with domestic questions as to make distinction impossible. Quite to the contrary, these cases teach incisively that the foreign affairs power *must* be sharply differentiated from the President's powers in domestic affairs, or else the entire concept of a government of limited powers with a separation of functions will vanish. Cf. *Youngstown Sheet & Tube Co. v. Sawyer, supra,* and that *even as to* the broad foreign affairs power

[33] Four of the cases cited involve facts relating solely to the President's powers in foreign affairs; powers relating to the recognition of foreign governments, the making of treaty agreements and negotiations with a foreign government. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1936); *United States v. Pink*, 315 U.S. 203 (1941). Two of the cases concern the powers of the President as Commander-in-Chief of the Armed Forces; his authority over military installations, *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960), and the power of the President to withhold the grant of a license to an air carrier seeking permission to fly a foreign air route. *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*, 333 U.S. 105 (1947). In the latter case, the President's military power as it relates to the granting of foreign aerial routes is intimately tied to the Government's plans for national defense in military matters.

In re Debs, 158 U.S. 564 (1894), involved the question of whether the President could properly seek injunctive relief against railway employee's obstruction of interstate commerce as an exercise of his power over such commerce, or whether to do so would infringe upon the state's sovereignty.

this is limited by the express prohibitions of the Constitution. *United States v. Curtiss-Wright Corp., supra.*[34]

The power of the President as Commander-in-Chief is similarly limited by the Constitution. *Youngstown Sheet and Tube Co. v. Sawyer; supra.*[35]

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[34] In *Curtiss-Wright, supra,* 299 U.S. at 315-321, the Court distinguished between the President's power in the area of foreign affairs and his power over domestic affairs. Only in the former is the President's power inherent, and therefore not to be found within the enumerated powers in the Constitution. Even accepting this broad interpretation of Presidential power, it is clear that he may not act contrary to *the express prohibitions of the Constitution.* Justice Sutherland expressly qualified the concept of inherent power when he stated: "a power which ... like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution." *Supra,* 299 U.S. at 320. It should be noted that the historical analysis employed by Justice Sutherland to justify the concept of inherent power has been criticized as being factually erroneous. *See* Levitan, "The Foreign Relations Power: An Analysis of Mr. Sutherland's Theory," 55 Yale L.J. 467 (1946) and Patterson, "In Re the *United States v. Curtiss-Wright Corp.,*" 22 Tex. L. Rev. 286, 445 (1944).

In *United States v. Belmont, supra,* the Court specifically stated that the question of rights under the Due Process Clause of the Fifth Amendment was not raised therein, *supra,* 301 U.S. at 332. In *United States v. Pink, supra* at 228, the Court found no unconstitutional deprivation of property in violation of the Fifth Amendment. Implicit in these decisions is the constant recognition by the Court that if there were such violations, the Presidential power could not be upheld.

[35] In *Cafeteria & Restaurant Workers Union v. McElroy, supra,* the Court found that the petitioner was not denied her rights under the Due Process Clause of the Fifth Amendment since employment at a military installation is a privilege rather than a constitutional right.

The factual situation involved in *Chicago and Southern Air Lines v. Waterman Corp., supra,* is distinguishable from this case in that the former involved the denial of a licensing privilege, as opposed to the denial of a Constitutional right, as a result of the exercise of the President's power as Commander-in-Chief.

In re Debs, supra, stands only for the proposition that the Government may exercise power where such power has been Constitutionally

None of the cases relied upon by the Government lend any support to the claim that the broad foreign affairs power is so intermingled with domestic questions as to erase constitutional limitations in that area. Such a doctrine would in the warning words of Justice Story "clothe" the President "with an absolute despotic power over the lives, the property, and the rights of the whole people." Story, *supra*, at p. 177. Every decision of this Court touching the powers of the Executive seeks to guard against precisely the concepts urged by the Government in this case. *Ex parte Milligan, Youngstown Sheet and Tube, New York Times v. United States*, all *supra*.

4) The government has further argued that its present practices of electronic surveillance of domestic organizations are merely a continuation of the policies of previous administrations. In support of its argument, it has submitted a series of memoranda written by Presidents from Roosevelt to Johnson. In fact, these memoranda and the legislative history reveal a longstanding practice of *never* prosecuting where warrantless electronic surveillance had been conducted.

Until the present administration took office, no President or his Attorney General ever advocated that warrantless electronic surveillance for the purpose of protecting the national security could be used in a judicial proceeding. The choice of the Executive was to investigate or prosecute, never both. This recognition encompassed so-called foreign security electronic surveillances. The decision of this Court in *Nardone v. United States*, 302 U.S. 379 (1937) was taken by successive administrations to mandate a blanket prohibition against revelation of wiretap and other electronic surveillance activities in judicial proceedings including electronic surveillance for national security purposes.

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granted. It offers no support for the argument that Constitutionally granted power may be exercised in derogation of Constitutional rights.

It is also perfectly clear that because past administrations were unhappy with the holding in *Nardone, supra* which made prosecution in foreign security cases impossible, they therefore asked the Congress for legislation allowing the Government to prosecute utilizing its information gathered by warrantless electronic surveillance in these circumstances. See, e.g., Rogers, "The Case for Wiretapping," 63 Yale L.J. 792 (1954); Brownell, "The Public Security and Wiretapping," 39 Cornell L.Q. 195 (1954). However, legislative authorization for the use of such warrantless electronic surveillance never was enacted. See Point II, *infra.*

Until very recent days the Government never claimed that it could both engage in warrantless electronic surveillance and prosecute.[36] This recognition of the blanket prohibition of *Nardone* was applied with full force even in foreign security cases.[37] This is reflected in the exchange of memo-

[36]See the dialogue between this Court and the Solicitor General, as quoted by Mr. Justice Stewart, on this issue in *Giordano v. United States, supra* at 313, n. 1.

[37]See the discussion of the *Coplon* case, *United States v. Coplon,* 185 F.2d 629, 636 (2nd Cir. 1950), *cert. den.,* 342 U.S. 920 (1952) by Attorney General Brownell in 39 Cornell L.Q., *supra* at 200, n. 22. See also the dialogue between this Court and the Solicitor General in *Giordano, supra,* concerning the *Butenko* case, *supra,* which was clearly concerned with foreign security. There is no basis to the argument by the Executive that *Nardone v. United States, supra,* merely prohibited disclosure of illegal surveillance activities in a criminal case but allowed for so-called investigative surveillance if the seized information was only disclosed among members of Government agencies. See the Brownell and Rogers articles, both *supra.* This seems to be a questionable reading of Sec. 605 of the Communications Act. See the 2nd *Nabdone* case, 308 U.S. 338 (1939) and *Gouled v. United States,* 255 U.S. 298 (1921). More importantly, *Katz v. United States,* 389 U.S. 347 (1967), decides the question of the legality of electronic surveillance in *constitutional* Fourth Amendment terms so the invasion of privacy occurs whether revelation of the seized materials is in a criminal case or merely to the Government agent performing the task of listening in on the private utterances. And, of course, the remedies available to one whose conversations are overheard are broader. Besides a motion to suppress illegally seized evidence, *Katz, supra,* there are damages remedies, 18 U.S.C. 2510, et seq. See also *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971).

randa the Government has alluded to as its authority for a program of domestic security surveillance. (See App. 68-72.) This exchange of memoranda is consistent with the recognition by past Attorneys General and Presidents that such investigative surveillance obviates the possibility of prosecution where disclosure must necessarily occur. Moreover, the memoranda reflect a limitation of such surveillance to the narrow area of foreign security as defined by Justice Stewart in his concurring opinion in *Giordano, supra.*

In January 1969 the new administration for the first time since the decision of this Court in *Nardone* openly asserted that its warrantless wiretapping activities in the narrow area of foreign security did not foreclose criminal prosecution in such cases.[38]

This new departure of the Administration reflected a dissatisfaction with the decision of this Court in *Alderman* requiring disclosure of the contents of surveillances where such interceptions, even in the foreign security area, are found to be illegal under the Fourth Amendment. In writing for the Court in *Alderman,* Mr. Justice White had applied the disclosure requirement to illegal surveillances even where the disclosure might damage the national security. The alternative to disclosure, as conceded by the Executive in *Alderman,* was dismissal of the indictment. *Alderman, supra,* at 181, 184. This requirement of full disclosure applied to foreign security cases as well as all others whenever the surveillance is illegal.[39] The opinion of the Court in *Alderman, supra,* held that the mere assertion by the Ex-

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[38]See generally, *United States v. Stone, supra; United States v. O'Baugh, supra; United States v. Clay, supra; United States v. Brown,* 317 F.Supp. 531 (D. La. 1970); *United States v. Butenko, supra; United States v. Hoffman,* D.D.C. No. 97331 (decided November, 1971).

[39]Compare the opinions of Mr. Justice Harlan and Mr. Justice Fortas on the question of disclosure in foreign security cases, *Id.* at 187, 197 and 200, 209 respectively.

ecutive that a particular foreign security surveillance is lawful does not thereby foreclose review. The Court's opinion even contemplates circumstances where foreign security surveillance, the only question left open by the Court (see pp. 92-95, *supra*), will have to be disclosed upon a finding of illegality:

> The Government concedes that it must disclose to petitioner any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. *Alderman, supra* at 181.

This absolute requirement of disclosure as set forth in *Alderman, supra,* which contemplates disclosure even in foreign security surveillance situations, can only mean one thing: the mere assertion of the Attorney General of legality can never control. Courts are required to make an independent inquiry of their own and *Alderman* holds that in some circumstances, at least, the Government, in the interest of foreign security considerations, will have to accept dismissal of the indictment as the only alternative to disclosure. Cf. *Coplon v. United States, supra* (opinion of Judge Hand).

This Court has not as yet spelled out the precise boundaries of the foreign security situation, cf. *Giordano v. United States, supra,* a question which, as we have pointed out above, is not involved in the present appeal.

What is astounding, however, is that prior to any adjudication by this Court as to the legality of any "exception" to the Fourth Amendment requirements in the area of foreign security, the new administration, shortly after its unprecedented assertion of a supposed "foreign security exception," attempted to bootstrap its argument into a claim that this new exception *not yet even ruled upon by the Court,* bottomed a far *broader* claim of power to sanction

in criminal proceedings warrantless electronic surveillance based solely upon the determination by the Attorney General that citizens were involved in purely *domestic* "attempts" to "subvert the existing system of government." This incredible attempt to parley a foreign security exception *not yet acknowledged* by the Court, into an omniously sweeping bid for power over domestic political opponents, was first made in June 1970 in *United States v. Dellinger*, N.D. Ill. No. 69 CR 180, the first prosecution under the so-called federal anti-riot statute, 18 USC Sec. 2101 (1968).

Any effort to justify this unprecedented claim of executive power to set aside constitutional limitations in the area of domestic alleged "subversion," whatever that broadly sweeping term means (see Point I-A *supra*), upon a "foreign security" exception to the Fourth Amendment, is not only based upon an "exception" which itself does not yet exist and is itself *not* a blanket exemption from Fourth Amendment requirements on the mere say-so of the Attorney-General, see Mr. Justice White's opinion in *Alderman, supra*, but is a patent attempt to evade the clear teachings of this Court in respect to the powers of the Executive within the framework of a constitutional Republic.

C. The Executive's Claim of Unlimited Power to Engage in General Searches, into the Words, Ideas and Thoughts of Citizens, Unless Rejected by this Court, will be an Instrument for Stifling the Liberties of the People Guaranteed by the First Amendment to the Constitution

The ultimate thrust of this case, as the Court of Appeals so incisively perceived, goes far beyond the rights of the individual respondents before the Court. The Government has seen fit to use this case as the vehicle for propelling a claim of Executive power so ominous in its implications and sweeping in its dimensions that it has transformed this appeal into one of those cases in the history of the Court which touch the "bedrock of our political system," *Rey-*

nolds v. Sims, 377 U.S. 533 (1964). The Executive has decided, in full consciousness of the extraordinary impact of the position adopted, to press a contention, which if sustained would "strike at the heart of representative government" *Harman v. Forsennius*, 380 U.S. 528 (1965). This then is one of those cases which due to their "peculiar delicacy," *Marbury v. Madison*, 1 Cranch 137 (1803), call for the exercise of those powers which flow from the historic role of this Court as the "ultimate interpreter of the Constitution" *Baker v. Carr*, 369 U.S. 186 (1962).

These awesome and foreboding considerations which sweep far beyond the immediate questions, as serious as they are, which affect the individual respondents, arise from the frank attempt of the Executive to use this case to obtain the sanction of this Court for a program of domestic espionage and surveillance of political opponents to the administration in power unprecedented in our history. The final and ultimate impact of this grasp for excessive and uncontrolled Executive power is not simply to undermine and erase those prohibitions of the Fourth Amendment which this Court has called the embodiment of fundamental principles of liberty, *Boyd v. United States*, 116 U.S. 616 (1885). Its most serious consequence will be the stifling of those political freedoms guaranteed by the First Amendment to the Constitution upon whose continued vitality and life this Court has warned "lies the security of the Republic," *DeJonge v. Oregon*, 299 U.S. 353, 354 (1957) (opinion of Chief Justice Hughes).

The use of excessive and uncontrolled Executive power to sweep aside Fourth Amendment protections against warrantless general searches and seizures as a means of shackling and intimidating a political opposition, thus undermining the solemn guarantees of the First Amendment, is not only the result of the application of contemporary twentieth century lessons based upon European tyrannies to the American scene. It flows from the most important of our *own* experiences as a people and reflects the central teach-

ing of our *own* history that arbitrary general searches and seizures have always beens the path to an assertion of tyrannical control over the lives and liberties of the people. It was out of this history of our past, the courageous struggles of John Wilkes and the English people against arbitrary arrest and seizure which as this Court recently pointed out in *Powell v. McCormack*, 395 U.S. 486 (1969), had such a "significant impact in the American colonies," and the bold and forthright stand of James Otis against excessive Executive power embodied in the writs of assistance and general warrants, see *Boyd v. United States, supra*, that the understanding emerged that the principles of the Fourth Amendment are the most important safeguards of the liberties and freedoms of the First. It was this understanding which the Court below so eloquently reflected in its statement of the central concept which illuminates the overwhelming importance of unswerving resistance to the Government's claim of power in this case:

> That which has distinguished the United States of America in the history of the world has been its constitutional protection of individual liberty. It is this which has created the wonderful diversity of this great country and its many and varied opportunities. It is this which has created Justice Holmes' free marketplace of ideas from which have come our most signal advances in scientific and technological achievement and in social progress. *Beyond doubt the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First.* (emphasis added) App. 61

This insight of the lower court reflects the constant teaching of this Court that the impetus to freedom reflected in our history cannot be artificially segmented into the ten individual amendments which constitute the Bill of Rights. The manifest purpose of all the Amendments was to allow for the continued political security of the people without arbitrary governmental interference. This was understood to be essential to a democratic form of government. Justice Brandeis concurring in *Whitney v. California*, 274 U.S.

357, 375 (1927), expressed the essence of this philosophy in now classic words, which have been only recently reaffirmed by this Court, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times v. United States*, 403 U.S. 713 (1971):

> They [the Framers] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

In *Stanford v. Texas*, 379 U.S. 476 (1965), the Court restated Justice Douglas's words in *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J. dissenting), reflecting the interrelationship of the First, Fourth, and Fifth Amendments, in protecting "the essence of a free government" as expressed in Justice Brandeis's words in *Whitney*:

> These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination, but conscience and human dignity and freedom of expression as well.

And in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court again restated the fundamental lesson of our experiences that:

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.

For as the Court went on to state in words which are so critical here:

> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. *The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.* For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. *Marcus, supra,* 729 (emphasis added).

The words of the Court a decade ago in *Marcus* apply with prophetic force to the program of domestic warrantless wiretapping the Attorney General has instituted and in this case, seeks sanction for from this Court.

The "unrestricted power of search and seizure." 367 U.S. at 729, which the government has claimed here, has already led to the use of electronic surveillance without the protection of a "neutral and detached magistrate required by the Constitution," *Coolidge v. New Hampshire,* 407 U.S. 453, against the widest spectrum of political opposition to the present administration as revealed in presently pending federal criminal proceedings. See Appendix A to this Brief.

In cases all over the country, affidavits similar to the one filed by the Attorney General in this case reveal a broad pattern of surveillance of individuals and groups working against injustice and for social change. See Appendix A. The subjects of the Attorney General's suspicion fall across a wide range—leaders of the anti-war movement, Black militants, Catholic pacifists, proponents of "youth culture" and other sections of the political opposition to the present Administration. Apparently, those who dissent strongly from the Administration's foreign and domestic policies are considered a threat to the "existing structure of the Government" (Affidavit of Attorney General) and become the subjects of surveillance. Simultaneous with these public avowals of warrantless wiretapping in pending criminal pro-

ceedings involving nationally known spokesmen of the growing political opposition to the foreign and domestic policies of the present administration, c.f. *United States v. Dellinger et al.,; United States v. Ahmad, et al.*, No. 14886, (M.D. Pa. 1971), *supra*, the Executive branch has engaged in an extensive public relations campaign urging its case for the "necessity" to conduct such surveillance in order to "preserve" the nation.[40] These activities, all of which cannot but have the effect of generating a climate in which "fear of internal subversion," cf. *Coolidge v. New Hampshire*, 403 U.S. at 455, becomes an increasingly dominant factor, offend deeply against the somber warnings of this Court in *N.A.A.C.P. v. Button, supra*, that the freedoms of the First Amendment "are delicate and vulnerable as well as supremely precious in our society" and "need breathing space to survive." *Id.* at 433. The program of the executive of widespread and loudly proclaimed warrantless wiretapping of the domestic political opposition, unless decisively repudiated by this Court, will inevitably have a strangling effect upon the "delicate and vulnerable" freedoms of the First Amendment, suffocating the "breathing space" they require "to survive." For of all forms of indirect governmental abridgement of fundamental liberties, electronic surveillance works perhaps the greatest chilling effect upon the exercise of First Amendment rights. *Cf. Dombrowski v. Pfister*, 380 U.S. 479 (1965). The uninvited ear of government means risking disclosure to the world at large ideas and opinions intended only for a limited audience. Surveillance, therefore, inevitably deters the full exchange of ideas that the First Amendment envisions,[41] "because of

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[40] See for example the speech of the Attorney General before the State Bar Association, Cincinnati, Ohio, April 23, 1971, as released by the Department of Justice.

[41] In *NAACP v. Alabama, supra*, the Court expressly warned against the chilling effect upon First Amendment freedoms caused by disclosure of that which is intended to be kept private: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint

fear of exposure of . . . beliefs," *NAACP v. Alabama*, 357 U.S. 449, 463 (1964), to hostile ears. As Professor Westin has pointed out "surveillance of individual and group conduct—a primary means of social control—can be carried to lengths that seriously impair freedom." Westin, *Privacy and Freedom* (1966). See also Dash, Knowlton and Schwartz, *The Eavesdroppers*, (1959). One of the most incisive analyses of the impact of the growing widespread surveillance of domestic dissidents is that of Circuit Judge Kiley of the Court of Appeals of the Seventh Circuit. Judge Kiley has warned of the increasing danger to political democracy, to freedom itself, flowing from this pattern of surveillance: "it seems enough to contemplate the spectre of a Big Brother observing how we think, feel and act, and the oppressive moral and political climate that would tend to suffocate our freedom" Kiley, *Privacy's Last Stand*, 26 The Critic 41 (1967).

It is this frank willingness to engage in a program of surveillance which can only "tend to suffocate our freedom," in Judge Kiley's sharp words, that is most disturbing about the Government's position in this case. In its effort to evade the clear requirements of the Fourth Amendment, an independent magistrate, probable cause, and particularity, see Point I, B *supra*, the Government blandly argues that the surveillance program is *unrelated* to any criminal prosecutorial function but is "merely" an investigative "intelligence gathering operation" required to protect the "security" of the nation. But to escape the strictures of the Fourth Amendment, the Government acts as if the First Amendment was non-existent. The Government's brief in this case reads as if the Executive has limitless uncontrolled

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on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462.

powers in the area of political association, beliefs and activities, all of which are affected by an "unrestricted power of search and seizure," *Marcus v. Search Warrant, supra* at 729, as long as these general searches are conducted unrelated to the purposes of immediate criminal prosecution. We doubt if a more incredible, and more frightening argument has ever been seriously advanced in this Court. Governmental action which impinges upon the "delicage and vulnerable" freedoms of the First Amendment, *NAACP v. Button, supra,* is constitutionally tolerated if at all *only* when required to prevent imminent lawless action." *Brandenburg v. Ohio,* 395 U.S. 444 (1970). See also *Baggett v. Bullitt,* 377 U.S. 360.

This Court in *Brandenburg* has now fully embraced the famous concurring opinion of Mr. Justice Brandeis, in *Whitney v. California,* 274 U.S. 357 (1927). The lesson there is that speculative fears of dissent or even disorder do not justify infringement upon First Amendment liberties: "Those who won our independence . . . valued liberty both as an end and as a *means.*" *Whitney, supra* at 375. This Court has taught time and time again that our form of government requires courage and that we must not capitulate to fear. In the words of Mr. Justice Brandeis,

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of full and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. *Id.* at 377.

Warrantless wiretapping, an "instrument" of "oppression and tyranny" in Justice Brandeis' own words, *Olmstead v. United States, supra,* is a classic feature of the "repression" which "breeds hate" *Whitney v. California, supra,* at 375 (concurring opinion of Justice Brandeis), and the "hate [which] menaces stable government," 274 U.S. at 375. It is a central characteristic of the "order" which is too often exalted "at the cost of liberty." 274 U.S. at 375.

To suggest that such governmental activity is to be tolerated, no less sanctioned by this Court, in the *absence* of any probable cause for criminal prosecution is to fly in the face of every decision of this Court in recent years enforcing the mandate of the First Amendment. See for example: *Brandenburg v. Ohio, supra; Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Thornhill v. Alabama,* 310 U.S. 88 (1940); *United States v. Robel, supra; Thomas v. Collins,* 323 U.S. 516 (1945); *Herndon v. Lowry,* 301 U.S. 242 (1937).

As this Court taught in *Elfbrandt,* standards controlling governmental action "touching . . . protected rights must be narrowly drawn to define . . . specific conduct as constituting a clear and present danger to a substantial interest to the State." 384 U.S. at 18. The standard the Executive seeks to sustain in this case as the justification for the governmental action which touches protected rights, 384 U.S. at 18, is neither "narrowly drawn" nor does it relate to any "clear and present danger to a serious substantive evil," *Schenck v. United States,* 249 U.S. 47. Quite to the contrary, the Executive candidly concedes that the governmental action is so far short of any "clear and present danger" that it does not even contemplate criminal prosecution arising out of the surveillance. Government Brief at 15-16. The "information" the Executive seeks through its warrantless wiretapping, relates, by its own statements, to activities which are so far removed from the "clear and present dan-

ger" criteria as to not even approach the outer boundaries of the criminal law.[42]

In its frantic efforts to evade the clear demands of the Fourth Amendment, prior approval by a "neutral and detached magistrate," *Coolidge v. New Hampshire, supra,* and the requirements of probable cause and particularity, *Marcus v. Search Warrant, Berger v. New York, Katz v. United States,* all *supra;* the Executive has advanced a position which would "wipe out" the First Amendment as well. *New York Times v. United States, supra* (concurring opinion of Justice Black).

We would suggest that no program of governmental activity that impinges upon the protected areas of the First Amendment has come before this Court for review in recent years which has so unashamedly and openly ignored the most elementary teachings of the Court in this most sensitive of areas of national life. We have pointed out earlier, see Point IA, *supra,* that the standard utilized by the Executive in this case to control the power exercised, "attempts" to "attack and subvert the existing structure of the government" (Affidavit of Attorney General) through its overly broad and vague formulations operates as a dragnet that inhibits "the exercise of individual freedoms protected by the Constitution." *Baggett v. Bullitt,* 377 U.S.

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[42] The Executive has formulated its surveillance program in the broadest terms to include mere suspicions and contingencies, not approaching the imminence requirement of *Bradenburg, supra:*

> In fulfilling this responsibility [to protect the government against unlawful overthrow], the President must exercise an informed judgment. This in turn requires that all pertinent information be readily available to him. This is particularly important with respect to his obligation to protect the government from unlawful overthrow, since he cannot remain passive until there may be actual acts of insurrection or sabotage. Instead, the President must be able to collect in advance and on a continuing basis the information he needs to protect the government against destruction or such weakening as renders it impotent to function. Government's Brief at 15-16.

372 (opinion of Mr. Justice White). The words of the Court in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) are particularly appropriate here: "Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415 and *Thornhill v. Alabama*, 310 U.S. 88." This case like *Aptheker* "involves a personal liberty protected by the Bill of Rights," *Cf. Boyd v. United States*, *Marcus v. Search Warrant*, *supra*, and the words of *Button* are therefore "particularly appropriate here," 378 U.S. 516: "Precision of regulation must be the touchstone in an area closely touching our most precious freedoms." 371 U.S. at 438.

Freedom from arbitrary general searches is surely one of "our most precious freedoms," *Cf. Boyd v. United States*, *supra*. But the standard which the Executive seeks to utilize here to justify the invasion of this freedom is perhaps the most imprecise, overly broad and vague standard ever to reach this Court for review. Compare *Baggett v. Bullitt*, *Cramp v. Board of Instruction*; *Keyishian v. New York*; *NAACP v. Button*; *Dombrowski v. Pfister*, all *supra*. It is a standard consisting of formulations this Court has time and again struck down as overly broad and vague in violation of the First Amendment. See for example, *Baggett v. Bullitt*, and *Cramp v. Board of Instruction*, *supra*. It is a standard which when used will "broadly stifle fundamental personal liberties," *Shelton v. Tucker*, *supra*. It is a standard which "lends itself to selective enforcement against unpopular causes," *NAACP v. Button*. It is a standard which in the words of this Court in Button "may easily become a weapon of oppression." And as the Court warned ominously in *Keyishian* it is a standard in which "uncertainty as to the scope makes it a highly efficient *in terrorum* mechanism," 385 U.S. at 601.

The requirement this Court has vigorously insisted upon for precision and strict and narrow formulation when gov-

ernmental action touches the areas of the First Amendment reflect the same understanding which underlies the Court's insistence that when the things "to be seized" are words and ideas, the procedural requirements of the Fourth Amendment must be most strictly construed. As the Court pointed out in *Stanford v. Texas* at 485, "no less a standard could be faithful to First Amendment freedoms." See also *Marcus v. Search Warrant, supra.*

A program of warrantless wiretapping, of broad sweeping general searches into the words and ideas of citizens, whenever the Attorney General in his sole discretion decides that a citizen or organization of citizens may be involved in activities which in *his* opinion "subvert the existing structure of the government" (Affidavit of Attorney General), is completely "violative of the commands of the Constitution." *Robel v. United States, supra,* at 266. As Mr. Justice Stewart wrote for the Court in *Cramp,* "the vice of unconstitutional vagueness is further aggravated when, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." 368 U.S. at 287. We have pointed out earlier, Point IA, *supra,* the extraordinary relevance here of Mr. Justice White's question in *Baggett v. Bullitt, supra* as to the sweep of the operative words then before the Court for examination, "Where does fanciful possibility end and intended coverage begin?" 377 U.S. at 360. It is impossible to answer this decisive question in respect to the standard the Executive uses here to govern the operation of a system of wholesale domestic espionage and surveillance without concluding in Mr. Justice Stewart's words in *Shuttlesworth v. Birmingham* that:

> Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of . . . [government action] bears the hallmark of a police state. 382 U.S. 90, 91

In the words of Mr. Justice Marshall writing for the Court in *Stanley v. Georgia,* 394 U.S. 557, 565 (1969), "our whole constitutional heritage rebels" at the development in

this country of a system of internal espionage which caused England's eminent Constitutional historian one hundred years ago to write "the freedom of a country may be measured by its immunity from this baleful agency." May, *Constitutional History of England*, at 275 (1803).

The warrantless wiretapping of domestic political opponents engaged in by the Executive in this case and for which it seeks the sanction of this Court on a general scale, will not stop with the militant or radical Americans now the object of these latter day general searches. Like an infection it will spread throughout the entire society until no one will be safe, no one will be secure, no one will be able to raise his voice in public or in private without fear of being overheard by a police agent of the government who may at any time distort these words or ideas into "evil thoughts" *Cf. Stanley v. Georgia*, subject to prosecution and conviction. And then the "silence coerced by law" is achieved which Justice Brandeis warned against many years ago. 274 U.S. 375. This, our modern history so sadly teaches us, is the inevitable prelude to the warning of Mr. Justice Jackson, of the ultimate conformity which can only finally result in the enforced silence of the graveyard, *Barnette v. West Virginia*, 319 U.S. 624 (1942). It is in this profound sense that the safety and the "security of the Republic," *DeJonge v. Oregon, supra*, depends upon the ability of this Court to meet its ultimate responsibility to rebuke any branch of the government which in the historic words of James Madison shall "overleap the great barrier which defends the rights of the people." Madison, *Memorial and Remonstrance, supra.*

This last Term this Court met such a challenge to the written Constitution and rejected the efforts of the Executive to claim an inherent power in the name of the "national interest" to set aside the commands of the First Amendment. The words of Mr. Justice Black in his last opinion for this Court are deeply appropriate here when once again the Executive claims a sweeping inherent power

in the name of the "national interest" to suspend the elementary liberties of the people this time to reintroduce into American life the arbitrary general searches and seizures directed against a political opposition which the Framers of the Constitution believed were banned forever from the new nation they were building. Justice Black's response to the Executive's extraordinary claim of power in *New York Times* last Spring was that to sustain the claim "would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure." And as the Justice wrote, in words which are dispositive here," the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (concurring opinion of Mr. Justice Black).

II.

THE EXECUTIVE'S CLAIM OF POWER IS NOT AUTHORIZED, SANCTIONED OR RECOGNIZED BY TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AND VIOLATES THE LETTER AND SPIRIT OF THE STATUTORY SCHEME CONSTRUCTED BY THE CONGRESS.

The government argues to this Court that in some way, Congress "has recognized the President's authority to authorize national security electronic surveillance without a warrant" (Government's Brief at 28) in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. This astounding argument flies in the face of the clear meaning of the entire statutory scheme. Title III of the 1968 Act stands, quite to the contrary, as a clear monument to the intention of Congress to prohibit *all* electronic surveillance except in the narrowly defined circumstances of the statute, and to permit it then only in accordance with the strict procedures that the statute sets forth. The statute reflects a Congressional intent to protect Fourth Amendment rights singu-

larly absent from the analysis presented to this Court by the Executive in this case.

The Government's contention that Sec. 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 [1968], "recognized" warrantless national security electronic surveillance is entirely without merit. (Government's Brief at 28-29). Their position contradicts the plain meaning of the statute on its face and the manifest intent of Congress. Sec. 2511 provides generally that "interception and disclosure of wire and oral communications [shall be] prohibited."

This statute, enacted after this Court's constitutional decisions on the question of electronic surveillance in *Katz* and *Berger*, both *supra*, clearly rejects the truncated reading of the Communications Act of 1934, 47 U.S.C. § 605 [1934] advanced by the Executive after the *Nardone* decision, discussed above. Prior administrations, beginning with President Roosevelt advocated the legality of investigatory "interception" although the recognition by all prior administrations was universal that once the executive had determined to investigate by electronic surveillance in the area of national security, prosecution was foreclosed.[43]

It is in this overall context of prohibition that the Government claims that the Congress authorized warrantless national security wiretapping. Sec. (3) of 28 U.S.C. § 2511 states that:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the president to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information

[43] The 1968 Statute, 18 U.S.C. §§ 2510-20, prohibits both "interception" and "disclosure" *United States v. Schipani*, 289 F. Supp. 43 (E.D. N.Y. 1968); Compare with the discussion of past practices in Point I, *supra*.

> deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. 18 U.S.C. § 2511(3).

Sec. 2511(3) cannot be considered in isolation from the rest of the statute. It is abundantly clear from an examination of Sec. 2511(3) in the broader context of all of Title III that, on the contrary, this section of the statute does not authorize warrantless national security wiretaps.

The statute does authorize, and carefully regulates, wiretapping in specified areas. Sec. 2516 is an affirmative grant of power to the Attorney General with regard to wiretapping. Compare Sec. 2511(3), *supra.* It allows the Attorney General to obtain a prior judicial warrant to engage in electronic surveillance when there is probable cause that it "may provide or has provided evidence of:

> (a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);
>
> (b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restric-

tions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in, narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses. 18 U.S.C. § 2516.

The crimes enumerated in Sec. 2516 (a) are "those offenses in the scheme of federal crimes which fall within the national security category." Sen. Rep. No. 1097, 90th Cong., 2d. Sess. 97 (1968). The Attorney General may use electronic surveillance to protect the national security, therefore, when a prior judicial warrant has been obtained

and the surveillance will provide evidence to prosecute any of these enumerated "national security crimes." No eavesdropping, even in the national security area, is authorized by this section without a warrant.

According to Sec. 2518(3), a warrant may issue only "if the judge determines that:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed to reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person, 18 U.S.C. § 2518(3).

Broad investigative wiretaps not directly related to procuring evidence of criminal activity do not meet this requirement and warrants authorizing them are not permitted under this act. Warrants may only issue to gain evidence of any of the crimes enumerated in Sec. 2516, including the national security category. This standard for issuing a warrant demands a nexus between the purpose of the wiretap and specified criminal activity that poses a threat to the national security. It is wholly consistent with the language of Sec. 2511(3) which defines threats to the national security in terms of illegal activity: i.e., "overthrow of the Government by force or *other unlawful means*, against *any or other clear and present danger* to the structure or existence of the Government," (emphasis added). From this convergence of meaning (with Sec. 2511(3)), it is clear that Sec.

2516 is the basic statement of how the Executive may exercise his "constitutional power . . . to protect the United States" against threats to the national security—that is only by utilizing the warrant provisions of Sec. 2516 and the emergency provisions of Sec. 2518(7) discussed, *infra*. The unwillingness of the Executive to recognize and utilize the remedy of this statute in the national security area attests to the unreasonableness of the searches in this case and of its program of national security investigations generally. See App. A.[44]

The legislative history of Sec. 2516 is further compelling evidence that the Government's position that the act recognized warrantless national security surveillance is untenable. Senator Long had proposed an amendment to limit the issuance of court orders allowing wiretapping to instances concerning organized crime. This proposed amendment was rejected by the Senate in order to preserve the court order system of Sec. 2516 in the area of the enumerated crimes which include those concerning the national security. Senator McClellan, the sponsor of the bill, argued against the proposed amendment because it:

> would end its (Title III) impact as a court system in the national security area. Under this amendment if you had information that someone was plotting to assassinate the President, you would

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[44] It has been observed that the Executive has never sought to utilize the warrant procedures, established by Congress in Sec. 2516 of the 1968 Act for national security investigations. Nathan Lewin, formerly deputy assistant attorney general in the Civil Rights Division of the Department of Justice, and assistant to the Solicitor General, writing in the November 20, 1971 issue of the New Republic stated:

> The law specifically authorizes court ordered tapping or bugging in the investigation of a number of federal criminal offenses. Heading the list are violations of the Atomic Energy Act, and of the Espionage, sabotage and treason laws. Yet not a single court order has been sought by the Justice Department for an espionage, sabotage or subversion investigation. Lewin, N. "FACTS ABOUT WIRETAPPING: Lewis Powell's Confusion." *The New Republic* (November 20, 1971), p. 16

need to show, before you get an order that he is associated with organized crime. I do not understand an amendment designed to go that far. We are not requiring that. We are giving discretion to the President to *act under the court order system in the national security area.* 114 Cong. Rec. 14, 702 (emphasis added).

The Government would have us believe that to compel the Executive to abide by the strictures of the Fourth Amendment would frustrate its efforts to protect the country from "bombings" and similar threats to our national security. (Government's Brief at 18, n. 7). This argument ignores the specific remedy provided by the Congress in the area of national security.

Congress has already considered which activities threaten the well-being of the society and made them crimes. Congress has also already determined which crimes are sufficiently serious to allow for the extraordinary invasion of privacy presented by wiretapping, and has provided for electronic surveillance authorized by warrant in fighting these crimes, which include the "national security crimes" enumerated in Sec. 2516. There are, of course, many lesser crimes for which no warrant proceeding authorizing electronic surveillance was contemplated because Congress obviously felt that those lesser crimes were not so serious as to justify the use of electronic surveillance, even by prior warrant.

Warrantless national security surveillance as advocated here by the Government would frustrate the Congressional purpose of limiting such surveillance to the specified crimes.

The Congress has already indicated its flexibility in responding to the changing character of national security threats by amending the list of crimes contained in Sec. 2516(1)(a) for which the warrant procedure may be utilized by the Executive. See e.g. 18 U.S.C. § 844 *et. seq.* which has been added to Sec. 2516 by Pub. L. No. 91-452 (July 29, 1970), a statute involving possession and use of

explosives. Compare p. 18, n. 7 of the Government's Brief. In the instant case, the crimes for which defendants were indicted would not support a warrant authorized by Sec. 2516. However, if the Executive had determined that investigation with the technique of electronic surveillance had been necessary, a warrant proceeding for investigation of other relevant crimes listed in 2516(1)(a) may have been appropriate. Furthermore, evidence of the crimes charged in the indictment gained by electronic surveillance as authorized by such a legal warrant would be admissible. See Sec. 2517(5). Sec. 2518(7) also authorizes a post validation of an otherwise lawful search.

What the Executive cannot do under this legislative scheme is search without a warrant under the vague and overly broad rubric of protecting the nation from so-called subversive elements as occurred in this case. See Affidavit of Attorney General (App. at 21-23, Paragraph 3). The Executive's claim that the Congress "recognized this vague and overly broad power by enacting Sec. 2511(3) ignores the clear meaning of the statute which prohibits general searches and attempts to authorize only those incursions on the rights of privacy which are within the strictures of the Fourth Amendment.

That Sec. 2511(3) does not authorize warrantless domestic security electronic surveillance is further supported by reference to another Section of Title III, 2518(7). This section containes the emergency provisions of the act whereby eavesdropping may be legally accomplished without a prior judicial warrant if a warrant is thereafter applied for within 48 hours. The exception applies only when:

> "(a) an emergency situation exists with respect to conspiritorial activities characteristic of organized crime and threats to the national security, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize the interception," 18 U.S.C. § 2518(7).

Congress determined exactly in what manner "national security" crime investigations should be specially handled. The special treatment prescribed by Congress is no more or less than to permit wiretapping, otherwise limited by the act, in emergency situations without a prior judicial warrant, *only* "if an application for an order approving the interception is made . . . within 48 hours after the interception has occurred, or begins to occur." Sec. 2518(7).[45] The standards for the post-search judicial determination of whether the surveillance was valid and therefore should be allowed, by warrant, to continue, or if completed, be validated, are the same standards as those set out in Sec. 2518(3) for the enumerated crimes of Sec. 2516.

The legislative history surrounding the enactment of Title III makes it unmistakably clear that this is the *only* exceptional treatment authorized by Congress with respect to wiretapping in the "national security" area. 114 Cong. Rec. 16,296. Title III was enacted along with the rest of the Omnibus Crime Control and Safe Streets Act of 1968 by the House after little discussion. Title III had originated in the Senate. The House, which finally passed the bill, immediately after Senator Robert Kennedy's untimely death clearly had the court order system in mind for dealing with "national security" problems. The only comment on this question came from two Congressmen. Representative Pollack carefully noted:

> Only in the case of national security can wiretaps be made without court order. *And even these are invalid if application for such order is not made within 48 hours after such surveillance is undertaken.* 114 Cong. Rec. 16,296 (emphasis added) [46]

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[45] Respondents take no position on the constitutionality of this and the other sections of Sec. 2510 *et. seq.* since they are not actually before the Court in this case for purposes of constitutional scrutiny.

[46] The only other Congressman to state any views before the House on warrantless wiretappings was Rep. Randall whose expressed view was almost identical with that of Rep. Pollack. See 114 Cong. Rec. 16,298.

The completeness and precision with which Sec. 2516 and Sec. 2518 establish the standards and procedure for national security wiretapping in both the ordinary and emergency situation indicate that this is the only way Congress intended to deal with the issue and further, that other methods of dealing with it are prohibited.

The Government's position that the statute authorizes warrantless surveillance is also incompatible with Sec. 2520, of Title II, which provides for the recovery of civil damages when, "Wire or oral communication is intercepted . . . in violation of this chapter." "Good faith reliance on a court order or on the provisions of Section 2518(7)" are defenses to such a suit. No defense for "national security" wiretapping is set forth. The failure to include "national security" surveillance in the list of defenses necessarily implies that, in fact, there is no "national security" exception to the warrant requirements of Secs. 2516 and 2518.

Sec. 2511(3), on its face, also contradicts the Government's contention that this section "recognizes" warrantless national security electronic surveillance. A few lower courts have recently read in a "foreign security" exception to the blanket prohibitions against wiretapping in Sec. 605 of the Communications Act of 1934.[47] 47 U.S.C. § 605 [1934]. The Government contends that Sec. 2511(3) embodies a congressional acceptance of a foreign security exception and authorizes the executive to engage in warrantless wiretaps in foreign affairs cases. Respondents have argued elsewhere on this point. See Point I, B(4) *supra* at p. 98. Assuming, however, that Sec. 2511(3) did recognize this executive power, the statute does not carve out a corresponding domestic exception to Sec. 605 to permit Executive electronic surveillance without a warrant in the domestic security area.

There is a crucial difference in the language of 2511(3) with regard to foreign and domestic situations. In the for-

[47] See Point I, B(4), supra, at p. 100. This exception to Sec. 605 has been advocated by the present administration although never asserted in judicial proceedings by its predecessors.

eign area the statute says, "Nothing contained in this chapter *or in Sec. 605 of the Communications Act of 1934* shall limit the Constitutional power of the President . . ." (emphasis added). Concerning domestic threats, however, the provision is much narrower, "Nor shall anything contained in this chapter be deemed to limit the Constitutional power of the President . . ." This failure to mention Sec. 605 is significant. Sec. 605 provides that, "no person not being authorized by the sender shall intercept and divulge . . . any communication." This prohibition includes Federal officials as well as others. *Nardone, supra.* By explicitly exempting the foreign, but not the domestic area from the blanket prohibition of Sec. 605, Congress has clearly indicated a distinction between the foreign and domestic situations and an unwillingness to recognize the power of the Executive in the domestic area. Congress, in short, has refused to adopt a statutory exception to the blanket prohibition of Sec. 605 in the domestic area.

Other courts that have considered the meaning of Title III with regard to the Government's claims have identified additional compelling arguments which reject the proposition that Title III "recognizes" the alleged powers of the President to eavesdrop on domestic organizations without a prior warrant. These interpretations are in accord with the clear meaning of the total legislative scheme of Title III which sets forth with precision the availability of electronic surveillance in what Congress defined as national security crimes.

Judge Ferguson, in *United States v. Smith,* 321 F.Supp. 424 (C.D. Cal. 1971), treated the language of Sec. 2511(3) as simply an exception to the *punitive sanctions* of the act. Section 2511(3) is one of the specific provisions of Section 2511 which makes it a crime to intercept communications unlawfully. Sec. 2511(3), therefore, contains an exception to the criminal provisions of Sec. 2511(1) in the same manner as Sec. 2511(2) exempts another class of persons. Judge Ferguson found this argument as to the meaning of Sec. 2511(3) to foreclose the Government's claim that this section "recognized" the Executive's power to conduct general investigatory searches as claimed in this case.

> The major thrust of . . . [Sec. 2511] makes electronic eavesdropping a federal crime punishable by a fine of $10,000 or imprisonment of up to five years, or both . . . [Sec. 2511(3)] provides for one of those exceptions. Thus, the President does not commit a crime under the statute when he authorizes electronic surveillance "to obtain foreign intelligence information," similarly, it provides that the President is exempt by the criminal sanctions of the Act when he takes, "such measures as he deems necessary to protect the United States against overthrow of the government by force or other unlawful means."
>
> Regardless of these exceptions in the criminal statute, the President, is of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment. Congress expressly recognized this when it stated (in Sec. 2511(3)) that evidence resulting from such an electronic surveillance could "be received in evidence . . . only where such interception was reasonable . . ." *United States v. Smith, supra* at 425-426.

Thus, the President may be immune from the criminal sanctions under this provision, but the Fourth Amendment's exclusionary rule and the protections of the rest of Title III are not eliminated. The test of reasonableness remains that which the Fourth Amendment has historically required; and we have argued in points IA and IB, *supra*, that a prior warrant authorizing such a search is constitutionally mandated.

The Court of Appeals for the Sixth Circuit, in this case, in considering the language of Sec. 2511(3) also rejected the Executive's claim that the statute "recognized" the inherent powers of the President to utilize such surveillance against domestic groups for purposes of investigation to protect the national security. The lower court recognized that the Executive advocated this power, but held that Congress did not grant it in enacting Sec. 2511(3) of Title III:

> The language chosen by Congress . . . is not the language used for a grant of power. On the contrary, it was . . . clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned. *United States v. United States District Court*, (App. at 57).

The Court of Appeals pointed out that Section 2511(3) merely recognizes the existence of the claim and authorizes only that nothing shall limit the "constitutional" power of the President. The extent of that Constitutional power is left by Congress to this Court and to the Constitution.

The Congressional debate on Sec. 2511(3) supports the reading of this section by the Sixth Circuit. Senator Holland, one of the strong supporters of this provision responded to Senator Hart's fears concerning the potential application of the section:

> Mr. President. I think that the distinguished Senator is unduly concerned about the matter . . . We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing. 114 Cong. Rec. 14,751.

To which Mr. Hart replied:

> As a result of this exchange, I am now sure that just because some political group in this country is giving him fits, he could not read this as an agreement from us that by his own motion, he could put a tap on. 114 Cong. Rec. 14,751.

It is therefore apparent on the face of Title III that Congress provided a specific mechanism for the Executive Branch to follow in utilizing electronic surveillance in national security situations. The legislative scheme is designed to be consistent with the Fourth Amendment's imposing protections as guaranteed by this Court. The Congress specified the crimes for which such national security surveillance can be properly conducted, established the procedure for obtaining a prior warrant and set forth the limited emer-

gency procedures whereby a warrantless search, otherwise reasonable can be post-validated and continued with a warrant if necessary. Sections 2511(3) and 2515 require that in a judicial proceeding, such surveillance materials to be admissible, must comply with the constitutional requirements of the Fourth Amendment and the legislative scheme of Title III, designed to protect these guarantees.

It is abundantly clear that the specific language of Sec. 2511(3), relied upon by the government as Congressional recognition of the power it claims in this case, does not in any way support its position of engaging in warrantless Executive searches without a showing of probable cause and without adherence to the Fourth Amendment concept of particularity. To hold otherwise would do a grave injustice to the scheme set forth by the Congress in Title III.

The Congress did not consider Title III without benefit of specific decisions by this Court concerning electronic surveillance. The legislative history is replete with references to the Court's decisions in *Berger and Katz*, both, *supra*. And the Congress clearly knew of Mr. Justice White's admonition in his dissent in *Berger, supra*, that the desires of the Executive for broad legislatively authorized powers would not foreclose constitutional inquiry by this Court. The words of Title III, and in particular Section 2511(3) must be read consistent with the highest duty of this Court to interpret the actions of the legislature by the standard set in the Constitution. As the Court taught in *Marbury*:

> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, not such ordinary act, must govern the case to which they both apply. 1 Cranch. 135, 178 (1803)

See also *Powell v. McCormack*, 395 U.S. 486 (1969).

The protections of Title III of the rights of citizens lie in the particular efforts of the Congress to authorize specific surveillances for specific crimes effecting the national security and not in the vague and general language of Sec.

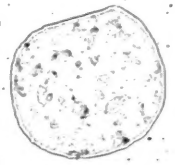
2511(3) which the Executive has read in isolation and without regard to the clear meaning of the remainder of the Act. In an area of governmental activity which touches the very quick of First Amendment rights as does a search for words, thoughts, and ideas, Cf. *Marcus v. Search Warrant*, and *Stanford v. Texas*, both *supra*, absolute precision of regulation must be the test of constitutionality. See *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 377 U.S. 208 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 ((1939); *Aptheker v. United States*, 378 U.S. 500 (1963); and *United States v. Robel*, 389 U.S. 258 (1967). To allow vague references to the shopworn "talisman of national security," *Robel, supra*, to control the business of measuring statutes against the Constitution would be to do away with constitutional freedoms themselves. The words of *Aptheker, supra*, should serve to remind us of this danger:

> The Government emphasizes that the legislation in question flows, as the statute itself declares, from the congressional desire to protect our national security. That Congress under the Constitution has power to safeguard our Nation's Security is obvious and unarguable. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-160. As we said in *Mendoza-Martinez*, while the Constitution protects against invasions of individual rights, it is not a suicide pact. *Id.* at 160. At the same time the Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end unduly to infringe a constitutionally protected freedom.' *Cantwell v. Connecticut, supra* at 304. *Aptheker, supra* at 509.

To distort the broad vague wording of Sec. 2511(3) into the grant of power the Executive here seeks would be to ignore the most elementary teachings of this Court that legislation which touches fundamental rights must be drawn narrowly and precisely. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Near v. Minnesota*, 283 U.S. 697 (1931); *NAACP v. Button*, 371 U.S. 415 (1960). In 1968, the year of the passage of the Act in question here, the then Attorney Gen-

eral had the occasion to remind the Congress in an analagous field of legislation that "federal legislation, if enacted, should be precisely drafted, with a clear definition of all operative terms, so as to preserve scrupulously the constitutional rights of all Americans."[48] To even suggest that the broad vague words of Sec. 2511(3) were "precisely drafted" enough to be considered a statutory grant of power is absurd on its face. If it were so read it would fall as unconstitutionally vague and indefinite under the most elementary principles of constitutional adjudication enunciated by this Court. Cf. *Shuttlesworth v. Birmingham*, 382 U.S. 871 (1963) (opinion of Mr. Justice Stewart); *Baggett v. Bullit*, 377 U.S. 360 (1964) (opinion of Mr. Justice White); *NAACP v. Button*, 371 U.S. 415 (1968) (opinion by Mr. Justice Brennan). However, here, unlike *Robel* and *Aptheker*, *supra*, the Court is able to read the statute, consistent with its plain words and underlying intent, so as to safeguard the "superior" impact of the Constitution. *Marbury v. Madison*, *supra*.

Title III must be read as consistent with the Fourth Amendment, not in derogation of it. The Executive's effort in reading the language of Sec. 2511(3) as recognition of "the President's authority to authorize national security surveillance without a warrant" (Government's Brief at 28) must be rejected as wholly violative of both the intent of Congress and the commands of the Fourth Amendment.



[48] 114 Cong. Rec. March 5, 1968, p. 5213.

III.

THIS COURT SHOULD NOT RECONSIDER, AS THE GOVERNMENT SUGGESTS, ITS CONSTITUTIONAL HOLDING IN ALDERMAN V. UNITED STATES THAT CONVERSATIONS OVERHEARD BY ILLEGAL ELECTRONIC SURVEILLANCE TO WHICH DEFENDANTS HAVE STANDING TO OBJECT MUST BE DISCLOSED FOR THE PURPOSE OF AN ADVERSARY HEARING ON RELEVANCE.

1) The Government argues a fall-back position to this Court in the event that its claims of legality for warrantless domestic security surveillance are rejected. It urges the Court to "reconsider" its decision only two years ago in *Alderman v. United States*, 394 U.S. 165 (1969). Its suggestion, simply stated, is that the courts should be permitted to determine *in camera* whether the conversations overheard by the illegal electronic surveillance are arguably relevant to a prosecution before disclosure to the defendant is required. Government's Brief, pp. 35-36. The Government concedes that *Alderman* has already determined this issue adversely to its claims but argues that "reconsideration" of *Alderman* "is appropriate . . . for a number of reasons." *Id.* at 36.

The Government concedes that *Alderman, supra*, requires disclosure by the Government to the defense in a criminal case where the surveillance was unlawful. The Court contemplates that, even in some so-called "national security" cases, the Government will be required to disclose or dismiss the indictment. *Id.* at 181, 184.

In advocating a reconsideration of *Alderman's* absolute requirement of disclosure whenever the surveillance in issue has been determined to be illegal, the Government has offered an analysis of the *Alderman* rationale which characterizes the opinion of Mr. Justice White as an exercise of the Court's supervisory power. Government's Brief at 37.

We believe that *Alderman* embodies an important Constitutional principal of notice to a litigant of materials unlawfully seized by the Government's wrongs as guaranteed

by the Fifth Amendment to the Constitution of the United States. *Alderman v. United States, supra,* and *Coplon v. United States,* 185 F.2d 629 (2nd Cir. 1951). Further, in the context of the unique problems of searches by the stealth of unlawful electronic surveillance, such full disclosure is the only way the Fourth Amendment exclusionary rule of this Court, *Weeks v. United States,* 232 U.S. 383 (1914), can be implemented since in the area of electronic surveillance, unlike other forms of searches, the defendant is at the mercy of the Government for the details of the illegal enterprise which the Government has perpetrated against him. The Court's decision in *Alderman v. United States, supra,* which announces a constitutional holding, requires full disclosure to a defendant of the logs of the illegal overhearing of his conversations.

The decision in *Alderman* is premised on the recognition by the Court that the use, by the Government, of unlawfully seized evidence in a criminal trial is contrary to the Fourth Amendment, is expressly proscribed by statute,[49] and is inimical to the public policy they seek to preserve:

> In a government of laws existent of the government will be imperiled if it fails to observe the law scrupulously . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that

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[49] Sec. 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

This section of the 1968 Act was before the Court when it decided *Alderman, supra. Id.* at 175-176.

> pernicious doctrine this Court should resolutely set its face. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

In order to uphold the "imperative of judicial integrity," *Elkins v. United States*, 364 U.S. 206, 222 (1960), which Mr. Justice Brandeis alluded to in his dissenting opinion, this Court in *Weeks v. United States*, 232 U.S. 383 (1914), fashioned the "exclusionary rule" prohibiting the introduction of evidence in a Federal criminal prosecution that had been seized in violation of the Fourth Amendment. *See also McNabb v. United States*, 318 U.S. 332 (1943). The "exclusionary rule" was applied to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961). The functional basis of the rule which is derived from the Fourth Amendment is three-fold: (1) "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it," *Elkins v. United States, supra* at 217; (2) to provide a means by which an "aggrieved party" may vindicate constitutionally guaranteed rights which have been violated, *see Jones v. United States*, 362 U.S. 257 (1960); *Marcusi v. Deforte*, 392 U.S. 364 (1968); *Simmons v. United States*, 390 U.S. 377 (1968); (3) to protect the integrity of the judiciary. *See Olmstead v. United States, supra; Elkins v. United States, supra.* *Cf.* 18 U.S.C. Sec. 2515.

Not only is the Government prohibited by the exclusionary rule from using evidence it has acquired directly and illegally, e.g., *Mapp v. Ohio, supra*, and *Katz v. United States*, 389 U.S. 347 (1967), but it is forbidden to use evidence which is derivative of an illegal search and seizure, i.e., "Fruit of the poisonous tree." *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1921); *Wong Sun v. United States*, 371 U.S. 471 (1963).

The Fourth Amendment also protects the individual against the "uninvited ear." Oral statements which are illegally overheard, and their fruits, are therefore subject to exclusion from a criminal proceeding under the rule expressed in *Weeks v. United States, supra.* In *Silverman v.*

United States, 365 U.S. 505 (1961), this Court recognized the right of citizens to be secure from eavesdroppers in one's own home. *Wong Sun v. United States, supra*, applied the "fruit of the poisonous tree" doctrine to *oral* statements made by the defendant to the police during the course of an illegal search of the defendant's home. Finally, *Katz v. United States*, 389 U.S. 347 (1967), recognized the principle that the Fourth Amendment protects an individual's *private conversations* as well as his premises from illegal searches and seizures. The Congress has legislated the imposing protections of the Fourth Amendment and its exclusionary rule into the statutes of the United States. See 18 U.S.C. Secs. 2510 et seq. and 3504.[50]

In the area of electronic surveillance, unlike other forms of searches and seizures, there is *no notice* of the occurrence of the search to the subject. To combat the lack of notice of electronic surveillance, this Court fashioned in *Alderman v. United States*, 394 U.S. 165 (1969), a procedural mechanism of constitutional dimension to effectuate the ruling of the Court in *Nardone v. United States*, 308 U.S. 338, 341 (1939), that the "trial judge must give opportunity . . . to the accused to prove that a . . . portion of the case against him" is the result of an illegal search and seizure. See also *Coplon v. United States*, 185 F.2d 629 (2nd Cir., 1951). The *Coplon* case, decided twenty years ago, recognized the constitutional nature of the requirement of disclosure of illegal surveillance logs to the defendant. Judge Learned Hand stated this proposition in the clearest of terms:

> . . . [T]he refusal to allow the defence to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf. In the case

[50] Compare *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), Chief Justice Burger dissenting.

> at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did "lead," or might have "led," to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism. *Coplon, supra* at 638.

In *Alderman, supra,* this Court ordered the Government to disclose to the accused and his counsel all illegally acquired wiretaps to which the defendant has standing to object. The Court rejected the Government's position, which it has sought to reargue here, that when dicslosure of an illegal wiretap poses a "potential danger to the reputation or safety of a third party or to the national security," the determination as to whether the records sought were in fact "arguably relevant" should be made by the trial judge in an *in camera* proceeding. This Court held that the exclusionary rule could only be effectively implemented by an adversary proceeding. *Id.* at 181.

In the present case before the Court the petitioner argues, contrary to the clear constitutional holding in *Alderman*, that the trial judge should make an initial *in camera* determination of "arguable relevancy" of the illegal electronic surveillance because the Attorney General has determined that disclosure of the logs "would prejudice the national interest." Affidavit of the Attorney General, App. 20. In *Alderman* the Court reaffirmed its holding in *Jencks v. United States*, 353 U.S. 657, 670 (1957) that "it is unconscionable to allow . . . (the Government) to undertake[n] prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense." In *Jencks*, as in *Alderman*, the fact that the illegal search related to national security was irrelevant. See also *United States v. Coplon*, *supra*.

Justice Fortas, in writing the majority opinion in *Dennis v. United States*, 384 U.S. 855 (1966) which required the Government to turn over the minutes of grand jury testimony which resulted in the indictment of the defendants, stated:

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a store house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations . . . such as [cases] involving the Nation's security. . . . At 873-875.

Justice Fortas in a separate opinion in *Alderman*, *supra* at 209, dissented from the majority's order to the Government to disclose to defendants Ivanov and Butenko, who were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States. He defined his usage in *Dennis* of the term "nation's security":

> I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression *by or on behalf of foreign states*. (emphasis added) *Id.* at 209.

Thus even Justice Fortas' restrictive definition of national security would not foreclose disclosure to the defendant in the present case, since the purpose of the surveillance in this case was to investigate a domestic organization. See Point I.B.4 *supra*. The Government has the choice of either obeying the Constitutional holdings of this Court and disclosing the evidence it has illegally seized or in the alternative dropping the prosecution. See *Dennis v. United States, supra; Jencks v. United States, supra; United States v. Andolschek*, 142 F.2d 502 (2nd Cir., 1944); *United States v. Coplon, supra; Alderman v. United States, supra.*

In order to insure against the possibility that illegally seized evidence may find its way into a criminal proceeding, in violation of the Fourth Amendment, this Court in *Alderman* ordered an adversary proceeding. Directing itself to the necessity for adversary proceedings, where illegal electronic surveillance had occurred, the Court said:

> [Adversary proceedings] will substantially reduce [the] incidence [of error] by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. *Id.* at 184.

As early as 1966 this Court in *Dennis v. United States, supra*, recognized that *in camera* procedures were not sufficient where the record was too complex, thus necessitating adversary proceedings:

> In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process . . . . *Dennis v. United States, supra*, at 875.

An essential component of our system of justice is the adversary proceeding. The adversary method has proven

itself to be a superior means for attaining justice; the demonstrated superiority of the adversary system is especially clear in situations, as in the case before the Court, ". . . where an issue must be decided on the basis of a large volume of factual material." *Alderman, supra* at 183-184.[51]

The Court in *Alderman* fashioned a procedural mechanism of constitutional dimensions consisting of (1) disclosure to the injured defendant of all illegal electronic surveillance records, and (2) an adversary proceeding so that the accused will be insured of an opportunity ". . . to prove that a substantial portion of the case against him was the product of unlawful surveillance." Conversely, such a proceeding provides an "opportunity to the Government to convince the trial court that its proof had an independent origin." *Alderman, supra* at 183. The mechanism established in *Alderman* represents the application, by the Court, of the Fourth Amendment exclusionary rule to the rapidly increasing number of cases involving illegal electronic surveillance. As the Court states, ". . . cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where *in camera* procedures have been found acceptable." *Id.* at 182, n.14.

Alderman, as an application of the exclusionary rule in the area of electronic surveillance, is a constitutional mandate and not merely an exercise of the Court's supervisory powers. The past holdings of this Court lend themselves

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[51] See the Transcript in *United States v. Gray* (N.D. Cal.), No. 69-141, May 4, 1971. The trial Judge spoke on the necessity of an adversary proceeding: ". . . having looked at the material [logs of the illegal electronic surveillance] . . . the volume is very great . . . And as *Alderman* points out, the Court, without having the background of this material and knowing thoroughly what is involved, is not one who could readily recognize whether or not material is arguably relevant . . . [it] is just a burden that should not be imposed upon the court, and it requires an expertise or a sophistication or a background that this court does not have. And also, how do I know whether any such material might be valuable for impeachment purposes?" See also, Opinion of the Sixth Circuit, App. 66.

to only one interpretation of the Fourth Amendment exclusionary rule; it is of constitutional origin.

Without the exclusionary rule, which acts as assurance against unreasonable searches and seizures, the Fourth Amendment "would be just a form of words, valueless in terms of human liberties," *Mapp v. Ohio, supra* at 655. In *Weeks v. United States, supra,* the exclusionary rule was formulated as a constitutional principle, representing a means of effecting the Constitutional guarantee:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confession . . . should find no sanction in the judgments of the courts, *whcih are charged at all times with the support of the Constitution.* . . . (emphasis added) 232 U.S. at 392.

If our courts acted differently, and allowed the admission, in a trial, of illegally seized evidence, it would represent "a disregard [by our courts] of the liberty deemed fundamental by the Constitution . . ." *McNabb v. United States, supra* at 340.

2) In support of its extraordinary request for a reconsideration of this Court's decision of two years ago in *Alderman,* the Government suggests that the 1968 Act, 18 U.S.C. Sec. 2518(8)(d) and (10) (a) in particular, has "superseded by legislation," Government's Brief at 37, this Court's decision in *Alderman* concerning the requirement of disclosure of illegal interceptions to a criminal defendant with standing to object. Apart from the doubtful logic of suggesting that Congress could ever overturn a constitutional holding of this Court, cf. *Powell v. McCormack, supra,* the suggestion is incredible in light of the fact that *Alderman followed* by a year the enactment of the 1968 Act.

The Executive has attempted to turn on its head the clear meaning of the 1968 Act by asserting that since the *Alderman* decision "reflects an exercise of the supervisory power" of the Court and because "Congress in the Omni-

bous Crime Control and Safe Street Act of 1968, 18 U.S.C. 2518(8)(d) and (10) (a) has taken a more flexible approach to disclosure than *Alderman*, that decision may well be superseded by legislation with respect to post-1968 surveillance." Government's Brief at 37.

A more topsy-turvy argument has never graced the pages of a brief to this Court. In the first place, we are told that the surveillance in this case occurred after June 19, 1968, Government's Brief at 42, the effective date of this Act, so if any statutory provisions control this issue it is the terms of the 1968 Act.[52] In fact, *Alderman v. United States*, 394 U.S. 165, 175-176 was decided March 10, 1969, almost one year after the effective date (June 19, 1968) of the 1968 Act. It is therefore a complete mystery to us how legislation enacted before the decision by this Court in *Alderman* can be grounds for arguing that *Alderman* was "superseded by legislation [the 1968 Act] with respect to post-1968 surveillance." Government's Brief at 37.

If there be any question that this answer to the Executive's argument challenges the credulity of the Government beyond tolerable limits, we refer the Court to the decision of Mr. Justice White in *Alderman, supra* at p. 175, n. 8 and n. 9, which describes the 1968 Act at some length and observes that the exclusionary rule fashioned by this Court is preserved and codified by its terms. See Sec. 2518(10)(a).

Unfortunately, the Government was not content to leave its argument from the statutes at this juncture. We are next told that the provisions of the 1970 Act, 18 U.S.C. 3504(b), which limit disclosure in pre-June 1968 surveillances to those which "are relevant to a pending claim of inadmissibility," reflect "the view of Congress that *Alderman* imposes a rule that is too inflexible." Government's Brief at 37.

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[52] We shall argue below that the terms of Title VII of the Organized Crime Control Act of 1970, 84 Stat. 935, 18 U.S.C. 3504 are irrelevant to this case because this statute by its terms concerns pre-1968 unlawful surveillance, clearly not in issue.

Whatever Congress may have had in mind for the Jencks Act Amendments concerning pre-1968 surveillance, their relevance to surveillance designated as post-June 1968 by the Government and thereby specifically exempted from the terms of the 1970 Act, Sec. 3504(b), escapes us.

There is one other failing in the Government's reference to the legislative history of both the 1968 and 1970 Acts. The Government has strenuously argued elsewhere in its brief (Government's Brief at 28) that the provisions of 18 U.S.C. 2510 et seq. do not apply where national security surveillance is concerned because:

> In 18 U.S.C. 2511(3), discussed *supra*, Congress excepted national security surveillance from the reach of the 1968 Act because it intended the government to be able to operate in that area without the stringent limitations that the Act imposed. Government's Brief at 41.

We have demonstrated at some length elsewhere (Point II, *supra*) that, to the contrary, the 1968 Act sets forth a procedure for the Executive to follow in engaging in all forms of electronic surveillance, including searches to preserve the "national security" from the enumerated criminal activities that Congress has determined constitute a sufficiently serious threat to the nation to warrant the intrusion into the protected rights of privacy that such electronic surveillance necessarily entails. But the inconsistency at this juncture of the Executive's argument to this Court is that reference to the legislative history of the 1968 Act, if it is germane to the Court's consideration of the impact of its *Alderman* decision on so-called national security electronic surveillance at all (*Alderman* post-dates the 1968 Act rather than precedes it), would imply a recognition that the 1968 Act applies to the kind of surveillance in issue. Of course, logic will not permit the Government simultaneosuly to concede that the 1968 Act applies here but to deny that the Government is bound by the warrant provisions provided there for national security surveillance. Therefore, the Executive is left with the weakest of conclusions as to the impact of the Congressional deliberations:

> In light of the provisions and history of the 1968 and 1970 Acts, we submit that the automatic disclosure dictated by *Alderman* should be considered superseded by congressional enactment even in respect to ordinary criminal cases. *A fortiori* it was Congress' intent that automatic disclosure not be required in the narrow circumstances of national security cases which it has exempted from the coverage of the 1968 Act. Government's Brief at 46-47.

In the best of circumstances, references to legislative history can only aid this Court in examining the clear meaning of a statute on its face. Cf. *Aptheker v. United States*, 378 U.S. 500 (1963). Reference to the history of a statute that by the Government's own arguments does not apply in the circumstances in this case, compounded by the Government's gross misstatement that the statute and its history supersede the decision in *Alderman* when in fact the statute precedes it by almost one year, leaves this Court with obfuscation rather than clarity. In these circumstances it would be useful to examine the relevant portions of the 1968 Act on their face.

The portions of the 1968 Act upon which the Executive relies provide:

> The judge, upon the filing of a motion, [following an inventory of a surveillance authorized by the chapter] may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications . . . as the judge determines to be in the interest of justice. 18 U.S.C. 2518(8)(d)

> Such motion [a motion to suppress] shall be made before trial, . . . The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice. 18 U.S.C. 2518(10)(a).

The Executive has read these two portions of the 1968 Act to mean that the statute "does not adopt an automatic disclosure rule, but gives the judge discretion to determine if disclosure is in the interests of justice." Government's Brief at 41. To support this reading of the statute, the Executive refers to the Committee Report of the Senate which reported out the bill. These two provisions, quoted above, were adopted as proposed. Senator McClellan spoke for the Committee on the Judiciary on the proposed sections in issue here. The Government has quoted *one portion* of Senator McClellan's remarks on the meaning of these sections. Government's Brief at 42, n.19. Those remarks merely state that the defendant cannot turn a motion to suppress into a "bill of discovery . . . in order that he might learn everything in the confidential files of the law enforcement agency." The sections also should not be read, the Senator said, as allowing that the privacy of other people will be "unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." *Id.* Even if nothing more had been said on the meaning of these sections of the 1968 Act, it would be clear that nothing in the provisions implied that a defendant in a criminal case, who had standing to object to the illegal overhearing of his own voice, ought not have those materials concerning him only.

Indeed, disclosure to a defendant in fact *was* contemplated. In commenting on the parallel language of Section 2518 (8)(d), Senator McClellan notes: "Through its operation all authorized interceptions must eventually become known at least to the subject." Sen. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968). All that is at issue in this case is the question of the requirement of turning over the conversations of the defendants themselves, if this Court should determine that the interceptions were illegal. For purposes of its argument to the Court on the vitality of the *Alderman* disclosure requirement, the Executive has postulated that the surveillance is illegal. Government's Brief at 35-36.

The provisions of the statute referred to by the Government therefore controvert its argument because the language "interest of justice" in both sections has been construed to require at a minimum disclosure "at least to the subject." Sen. Rep., *supra* at 105. And the inventory disclosure requirement of 2518(8)(d) applies to surveillance whether it be legal or illegal. *A fortiori*, illegal surveillance must certainly be disclosed.

In a transparent effort to buttress the weakness of arguing from legislative history of a Bill enacted *before Alderman v. United States, supra* on the proposition that the pre-*Alderman* legislation supersedes the *Alderman* holding, the Government next turns to provisions of the 1970 Act. That Act, by its terms, concerns surveillance that occurred *prior* to the effective date of the 1968 Act, June 19, 1968:

> (2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; 18 U.S.C. 3504(2).

The Act, by its terms, does not concern the surveillance in this case which occurred after the effective date of the 1968 Act. But, perhaps more importantly, the very comments of Senator McClellan that the Executive has quoted (Government's Brief at 46, quoting Senator McClellan in 116 Cong. Rec. S.1775) refer to the legislative history of the 1968 Bill relied upon by the Executive to show that Sections 2518(8)(d) and (10)(a) do not require full disclosure. As we demonstrated above, Senator McClellan, upon whose comments the Government relies, Sen. Rep. No. 1097, *supra*, does not suggest that a defendant in a criminal case who has standing to object to an illegal overhearing of his own conversations ought not receive the materials, "at least [concerning] the subject." *Id.* at 105. We are not here concerned with the meaning of this provision

of the 1970 Act which "is not applicable to the overhearing involved here, which occurred after June 1968." Government's Brief at 42. But we note in passing that the equation of meaning for the 1968 and 1970 Acts reflected in Senator McClellan's remarks, 116 Cong. Rec., *supra*, would indicate that nothing in the 1970 Act as well would limit the right of a defendant to full disclosure of his own words.

3) The Government's reason for arguing the need to reverse *Alderman* in the area of national security surveillance is clearly as a fall-back position in the event that the Court determines the underlying issue of legality against it. However, in developing its reasons for overruling *Alderman*, the Government has indicated that it will continue its program of warrantless investigative national security surveillances regardless of the outcome. The Government has identified a series of problems that will be caused by a requirement of automatic disclosure of illegally seized conversations to a defendant in a criminal case. Persons who have had an innocent conversation with those who are prosecuted and receive the disclosure, persons who are merely referred to, and Government informants and their families may be harmed by disclosure, we are told. "Pending investigations and prosecutions can be significantly impaired . . ." Government's Brief at 38. We are told that "all these problems are compounded in national security cases, where intelligence gathering is the objective and secrecy is absolutely necessary." *Id.* at 39. This is a strange assertion indeed for the Government to be making in the context of arguing against the disclosure requirement of *Alderman* should this Court determine the fundamental issue of legality against the Government. The Government has even suggested that a requirement of absolute disclosure "may even encourage defendants to telephone persons or locations that they suspect may be the subject of surveillance." *Id.* at 40. We would hope that a holding of illegality by this Court would foreclose this possibility since these locations would not be taped.

We must assume that if this Court should determine the fundamental issue of legality of so-called national security electronic surveillance against the Executive, that such surveillance will cease.[53]

It is intolerable to contemplate that the Attorney General, an officer of this high Court, may even consider the continued utilization of "this dirty business" if this Court should determine that warrantless investigatory electronic surveillance is a violation of the Fourth Amendment. "In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously . . .". *Olmstead, supra*, Brandeis dissenting at 485. The unfortunate history of continued Executive investigative surveillance following the decision in *Nardone v. United States*, 302 U.S. 379 (1937), should not be precedent for the same sorry effort by the Executive to avoid present constitutional and statutory protections against intrusions by the "uninvited ear." See *Katz v. United States*, 398 U.S. 357 (1967) and 18 U.S.C. 2510 et seq. "In a government of laws" such a warning ought not be necessary, but in the words of Mr. Justice Stewart, in *Giordano v. United States*, 394 U.S. 310, 315 (1969), ". . . the most carefully written opinions are not always carefully read—even by those most directly concerned."

In evaluating the Government's desire for a reconsideration of the *Alderman* decision, we urge this Court to consider what would result from the total insulation of the Executive's program of national security surveillance from the hard inquiry of adversary proceedings. In the twenty-four

[53] See the opinion of Judge Ferguson in *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), pending decision on Writ of Certiorari to this Court. Judge Ferguson confronted this very problem because the Executive boldly stated an intention to continue a program of investigative electronic surveillance even if the surveillance in the Smith case was ruled illegal and thereby not sanctioned by the District Court. See Government's Brief in the District Court at p. 3. See also p. 4 of the Government's Brief in the District Court in this case where the identical language is set forth.

years since the *Nardone* decision, investigative surveillance went forward with little or no scrutiny from the Courts, and with no knowledge on the part of the American people save the general innuendo precipitated by the occasional leak.[54]

It is the hope of many, including the Congress (see Point II, *supra*), that the decisions of this Court in *Katz* and *Berger* and the comprehensive legislation of their constitutional principles in 18 U.S.C. 2510, et seq. will end the "dirty business" that has plagued us since the early twenties.

We respectfully submit that the only way the protection of privacy envisioned by *Katz, supra,* can be accomplished is by limiting the Government to the narrow proscriptions of 18 U.S.C. 2510 et seq. and to the decisions in this Court for the conduct of its electronic surveillance activities. The only way this can be effected is through the time-honored process of litigation of the issue of taint after full disclosure in each and every case where the existence of surveillance is acknowledged. As the Sixth Circuit rightly concluded:

> These considera tions, of course, primarily affect this trial. Far more important, however, is the fact that disclosure may well prove to be the only effective protection against illegal wiretapping available to defend the Fourth Amendment rights of the American public. App. 67-68.

The "talisman" of national security has already been rejected by this Court as a reason for insulating the Government from the requirement of disclosure. See Point I.B.2 and 3, and *Alderman* at 181 and 184, both *supra.* And this result was reached, and ought not be overturned here, because the Government candidly told the Court in *Alderman* that it really could not "distinguish between that which threatened [the national security] and that which did not." *Id.* at 181-182, n. 13. For reasons already argued above, the

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[54] Significantly, the business of prosecuting criminals was not furthered one iota by electronic surveillance. See R. Clark, *Crime in America,* pp. 289-290 (1970).

Court found similar difficulties in "distinguishing between records which are relevant to showing taint and those which are not." *Id.*

The difficulties in determining taint have not changed. The *Alderman* decision and the legislation that preceded it (18 U.S.C. 2510 et seq.) now require that the Government reveal its "dirty business" to litigants. The Government's desire to continue to shield its unlawful activities from public view cannot overturn a determination by this Court that the only way the imposing protections of the Fourth Amendment can be effectuated is by requiring disclosure of unlawfully overheard conversations to a defendant who has standing to object to their use in a trial.

This Court should not reconsider its decision in *Alderman v. United States*, as the Government now suggests. The fundamental principles of liberty embodied in the Fourth Amendment require the salutory impact of its thoughtful conclusions.

IV

REMAND TO THE COURT OF APPEALS WITH DIRECTIONS TO DISMISS THE WRIT OF MANDAMUS AND TO REINSTATE THE DISCLOSURE ORDER OF THE DISTRICT COURT WOULD BE IN ORDER IF THE COURT SHOULD CONSIDER APPELLATE REVIEW BY WAY OF MANDAMUS INAPPROPRIATE AT THIS STAGE OF THE CRIMINAL PROCEEDINGS.

As we have argued throughout this brief, this case brings to the Court issues the resolution of which may well determine the continued vitality of constitutional government. There may, however, be some question concerning the appropriateness of appellate review by way of mandamus at this stage of the criminal proceedings. Cf. *Will v. United States*, 389 U.S. 90 (1967). Respondent-defendants' view of this question requires a frank expression of concern for the values involved. We believe, and we have so argued to

the Court, that it would be in the best interest of the parties to this proceeding, as well as the nation itself, if this Court decisively rejects the Executive's claim of power to engage in warrantless wiretapping of the type involved in this case. The very raising of the spectre of a system of domestic espionage and surveillance requires, as we have here urged, a reaffirmation by this Court of the fundamental values embodied in the First and Fourth Amendments. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *New York Times v. United States*, 403 U.S. 713 (1971).

We believe that the Executive itself is also desirous of a constitutional resolution in this case. In the more than thirteen criminal prosecutions in which this issue has emerged following the first claim of power to engage in such wiretapping which occurred in June, 1969, in *United States v. Dellinger, supra*, the Executive has sought judicial sanction for its new program of domestic espionage. Many of these courts have recognized the awesome consequences of this claim of power.[55] The analysis of the court below reflects this deep concern:

> "At issue in this case is the power of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction.
>
> This case has importance far beyond its facts or the litigants concerned.
>
> If decided in favor of the government, the citizens of these United States lose the protection of an independent judicial review of the cause and reasonableness of secret recordation by federal law enforcement of thoughts and expressions which have been uttered in privacy. If decided in favor of the respondent, it may prejudice an important criminal

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[55] *United States v. Hoffman*, (Cr. No. 973-71, D.D.C. Nov. 23, 1971); *United States v. Ahmad*, (No. 14950, M.D.Pa. Nov. 12, 1971); *United States v. Donghi*, (Cr. 1970-81, W.D.N.Y. May 14, 1971); *United States v. Hilliard*, (No. 169-141, N.D.Cal. May 4, 1971); *United States v. Smith*, (No. 4277-CD, C.D.Cal. Jan. 8, 1971).

> prosecution. And more important, of course, in all future surveillances undertaken in internal security matters, it may add at least some dimension of risk of exposure of federal investigatorial intentions. *United States v. United States District Court*, App. 9-10.

However, although this Court will undoubtedly be required to determine at some point the monumental questions that the Government has submitted to litigation here, these questions need not necessarily be decided at this stage of this proceeding. This is because there may be questions concerning the propriety of review by way of mandamus at this point in the case.

The propriety of review on the merits at this point of this criminal litigation by the Court of Appeals and now by this Court may have to be considered in light of the long standing federal policy against interlocutory review. Review sought during or before trial runs counter to the requirement of "finality [that] as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940).

The Government must meet a heavy burden to overcome this presumption against reviewability. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

In the recent case of *Will v. United States*, 389 U.S. 90 (1967), this Court outlined criteria for invocation of the extraordinary writ:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circum-

> stances amounting to a judicial 'usurption of power' will justify the invocation of this extraordinary remedy. *DeBeers Consol. Mines, Ltd. v. United States.* 325 U.S. 212, 217 (1945). *Id.* at 95.

Judge Keith's order requiring disclosure of electronic surveillance can in no way be characterized as an abuse of discretion, usurpation of judicial power, or refusal to act where he had duty to do so. Furthermore, the Government cannot justify interlocutory review in the present posture of this case, upon its claim that Judge Keith may have erred in ruling on matters within his jurisdiction.[56] The Court's opinion in *Will, supra,* is helpful on this point:

> "Nor do we understand the Government to argue that a judge has no 'power' to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Neither 'jurisdiction' nor 'power' can be said to 'run the gauntlet of reversible errors.' *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382 (1953). Courts faced wtih petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 223, 225 (1945) (dissenting opinion, Mr. Justice Douglas). *Id.* at 98, n. 6.

Mandamus may be further inappropriate because this case is a criminal proceeding and interlocutory review has

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[56] We note that the Government does not claim, nor can it on this record, that mandamus will lie under this Court's decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), to correct a disregard by the District Court of the limitations of the federal rules.

stayed the resolution of the charges against the defendants and thus served to deprive them of their right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution. *Will, supra* at 96; *DiBella v. United States*, 369 U.S. 121, 126 (1962); *Klopfer v. State of North Carolina*, 386 U.S. 213 (1967).[57]

This Court has often expressed the policy that "appeals by the Government in criminal cases are something unusual, exceptional, and not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957); see *Will v. United States, supra* at 96; *United States v. Sisson*, 399 U.S. 267, 290 (1970). Thus, the Criminal Appeals Act, 18 U.S.C. Sec. 3731, is strictly construed against the Government's right of appeal, *Carroll, supra* at 399-400. This Court in *Sisson, supra*, noted the legislative history of the enactment of the Criminal Appeals Act as reflecting the attitude of Congress toward government appeals:

> "[T]he legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials. . . . For the Criminal Appeals Act, thus born of compromise, manifested a congressional policy to provide review in certain instances but no less a congressional policy to restrict it to the enumerated circumstances." *Id.* at 298-299.

As this Court said in *Will, supra*, "mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies." *Id.* at 97. Thus, it is irrelevant to the appropriateness of mandamus, whether or not the Government may obtain review upon dismissal of the

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[57] Compare 18 U.S.C. 3731 as amended which provides for expedited appeals from suppression orders issued before trial in cases after the effective date of the act. This is clearly not such a case.

indictment for failure to disclose.[58] *DiBella v. United States*, 369 U.S. 121, 130 (1962).

The Court reaffirmed this principle in *Will, supra:*

> "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions. This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold. *Carroll v. United States*, 354 U.S. 394, 407-408 (1957). We may assume for purposes of this decision that there may be no other way for the Government to seek review of individual orders

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[58] Although the non-appealability of the order or issue involved in the proceedings below is not relevant or dispositive of the question of the jurisdictional requirements of mandamus, we are compelled to point out that it is nevertheless incorrect to state as a matter of law that the Government has no other method of review in this case.

We do not purport to make the Government's case with regard to appeal, but simply indicate options which might be available upon dismissal of the case. We assert that Judge Keith's order is not appealable within the present posture of the case, but this is not to say that the *issue* presented—the legality of the governmental surveillance and the order for disclosure—is only reviewable by mandamus and at this stage of the proceedings.

This Court expressly reserved decision in *Will* as to whether the Government could appeal in the event that the District Court dismissed the indictments because of its failure to comply with the bill of particulars order. *Will, supra,* at 96 n. 5. Further, we note that in *United States v. Hilliard*, (No. 71-2097, Ninth Circuit), the Government urges that it may appeal the dismissal of an indictment for failure to disclose electronic surveillance.

It simply is not true that as a matter of law it is beyond controversy that there is no remedy except by extraordinary writ. Mandamus is certainly easy and expedient for the Government, but it is not exclusive or appropriate. We also note that this very issue is on appeal after jury conviction in *U.S.A. v. Dellinger*, (No. 18295 Seventh Circuit Court of Appeals) and a judgement against the Government or the Appellants could be brought to this Court by Writ of Certiorari to the Seventh Circuit.

directing it to fill bills of particulars." *Id.* at 97 n. 5.

The Sixth Circuit Court of Appeals justified interlocutory review on the merits on two grounds: (1) the importance of the issue to both parties, and (2) the fact that the issue is a matter of first impression in the appellate courts. Respondents are heartened by the Sixth Circuit's rejection of the Government's extravagant claim of authority to conduct surveillance free from judicial scrutiny. However, it is not clear that the issue was ripe for review in the Court of Appeals. A consequence of such review is delay of a criminal proceeding.[59]

If this Court should determine that the constitutional issues involved ought not be decided on the record of this case because of the manner of review by Writ of Mandamus in the Court of Appeals, a remand to the Court of Appeals to dismiss the Writ of Mandamus would be entirely appropriate. The consequence of a dismissal of the Mandamus proceeding would be to reinstate the disclosure order of the District Court. The criminal trial in this cause could then go forward or, the Government could then seek appellate review from an order dismissing the indictment in this cause if it chose not to disclose the logs of the illegal surveillances.

CONCLUSION

There have been some cases in the history of this Court of such "peculiar delicacy", *Marbury v. Madison*, 1 Cranch 137 (1803) that they have placed in the balance the continued existence of the values adhered to by the "authors

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[59]We note in this regard the remarks of the Chief Justice at the convention of the American Bar Association, deploring "the hydra of excess proceduralisms, archaic formalisms, pretrial motions, appeals, continuances, collateral attacks, which can have the effect of dragging justice to death and stealing the very life out of the law." *New York Times*, p. 1, July 17, 1971.

of our fundamental constitutional concepts", *Coolidge v. New Hampshire, supra,* at 455 (opinion of Mr. Justice Stewart). These cases arise at the crossroads of our history as a Nation; at those moments when the pressures and conflicts of the day cause even those who sit in places of high position to seek to throw off the restraints and limitations which the founders placed upon the exercise of governmental power. As this Court warned last Term, in "times of unrest, whether caused by crime or racial conflict or fear of internal subversion" the restraints and limitations of the "basic law and the values that it represents may appear unrealistic or 'extravagant' to some." *Coolidge v. New Hampshire, supra* at 455. At such a moment, fraught with the gravest danger for the continued vitality of a system of government which does "not exalt order at the cost of liberty" *Whitney v. California, supra* at 377 (concurring opinion of Mr. Justice Brandeis), these cases which touch the "bedrock of our political system," *Reynolds v. Sims, supra,* invoke the most awesome "responsibility of this Court as the ultimate interpreter of the Constitution." *Baker v. Carr, supra* at 211. When one branch of government, no matter how powerful, attempts to "overleap the great barrier which defends the rights of the people," Madison, *Memorial and Remonstrance, supra,* it is the solemn duty of this Court to repudiate such incursions into the freedoms which made this a "government of laws and not men." It is in such cases that this Court faces anew at each turning point in our history the unflinching question put by the first Chief Justice in the troublesome first days of the Republic: "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?" *Marbury v. Madison, supra.* This is once again such a case, and once again this Court faces the ultimate question placed by the great Chief Justice.

In the name of "necessity", in the name of "expediency", in the name of "security", the representatives of the present Executive reflecting a growing tendency to

regard the values of personal liberty embodied in the founding covenants as "unrealistic" and "extravagant", cf. *Coolidge v. New Hampshire*, have asked this Court to sanction a claim of power unprecedented in the history of the Republic. Espousing a doctrine this Court once characterized as having the most "pernicious consequences," *Ex parte Milligan*, 4 Wall, at 295, the present administration seeks the virtual suspension of the guarantees of the Fourth and First Amendments to permit the institution in this country of a sweeping system of warrantless general searches and seizures of the ideas, words and opinions of American citizens through that most odious weapon of "tyranny and oppression", electronic wiretapping and surveillance. Cf. *Olmstead v. United States, supra* (concurring opinion of Justice Brandeis).

Those who founded this nation "by revolution on this continent", *Coolidge v. New Hampshire, supra*, feared most the "abuse of executive authority," Cooley's *Constitutional Limitations, supra*, manifested in the hated general searches. It is of deep significance that they looked to the protection of the "neutral and detached magistrate required by the Constitution," *Coolidge, supra*, 403 U.S. at 453. In rejecting the extraordinary claim advanced here by the Executive this Court will be not only exercising its historic and ultimate role to interpret, defend and preserve the written fundamental law. *Marbury v. Madison, Baker v. Carr, Powell v. McCormack*, all *supra*. By enforcing the mandate of the Fourth Amendment, its very "point", *Coolidge v. New Hampshire*, the constitutional requirement of the prior judicial approval of a "neutral and detached magistrate," this Court will be vindicating the historic role of the judiciary shaped and fashioned by the founders, to be the ever present champions of the liberties of the people, the "impenetrable bulwark against every assumption of power" by the other branches of government. Only this last Term of Court, in resisting a bid for arbitrary power by the Executive which would have entrenched upon the basic freedoms of the people, Mr. Justice Black, in his

last opinion for this Court, had the occasion to remind us all of the words of James Madison, the author of the First Amendment:

> "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights, 1 Annals of Cong., 439. 403 U.S. at 718, 719.

Once again this Court is called upon to be "an impenetrable bulward against" an "assumption of power" by the Executive.

The judgment below of the Court of Appeals should be affirmed.

Respectfully submitted,

Arthur Kinoy
Rutgers University
School of Law
180 University Avenue
Newark, New Jersey

William J. Bender
Rutgers University
School of Law
Constitutional Litigation
Clinic
103 Washington Street
Newark, New Jersey

William Kunstler
Center for Constitutional
Rights
588 Ninth Avenue
New York, New York

Hugh M. Davis, Jr.
715 Grand Boulevard
Detroit, Michigan

Leonard I. Weinglass
108 Washington Street
Newark, New Jersey

Of Counsel
on the Brief: *

Arthur Kinoy
Rutgers University
School of Law
180 University Avenue
Newark, New Jersey

William J. Bender
Rutgers University
School of Law
Constitutional Litigation
Clinic
103 Washington Street
Newark, New Jersey

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APPENDIX A*

CASE	HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION
1) *United States v. Dellinger, et al.*, U.S.D.C. ND. Ill. 6/69 69 CR 180	Defendants moved prior to trial for disclosure of any electronic surveillance concerning them.	6/69 Attorney General Mitchell's affidavit: (1) Defendants participated in conversations overheard by taps used (a) to gather foreign intelligence information, or (b) to gather intelligence information concerning domestic organizations which seek to use force & other unlawful means to attack & subvert existing structure of government; (2) It would prejudice National interest to disclose particular facts concerning this surveillance other than to the Court in camera. Additional surveillances were revealed during and after trial.	Post Trial 2/26/70 (1) After examination of government's submission in camera & hearing oral arguments & briefs, District Court concluded such surveillance was lawful & therefore required no disclosure to defendants. (2) District Court further concludes that no constitutional rights of any defendants were infringed. (3) As to additional unlawful surveillance Court found trial evidence was not tainted by the unlawful act.
2) *United States v. O'Neal* U.S.D.C. Kansas 8/6/70 KC-CR1204	Defendant moved for disclosure.	8/6/70 Attorney General Mitchell's affidavit: (1) wiretaps were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert the existing structure of the government. (2) would prejudice national interest to disclose other than in camera.	9/1/70 District Court tapes were legally obtained as President may gather intelligence information having to do with matters vital to national security.
3) *United States v. Smith* ; U.S.D.C. CD Calif. 321 F. Supp. 424 Crim. No. 4277-CD	On appeal of conviction to Court of Appeals Government disclosed to Court of Appeals that it had found that defendant had participated in conversations which were electronically monitored – remanded to District Court for proceedings required by *Alderman v. United States.*	– from Opinion of U.S.D.C. J. Ferguson (1/8/71) (1) Defendant overheard during gathering of information deemed necessary to (a) protect the nation from attempt of domestic organizations to use unlawful means to attack & subvert the existing structure of government. (2) Decision to initiate surveillance in this type of case must be based on wide variety of considerations & on many pieces of information which cannot readily be presented to a magistrate (Gov't brief at 8).	On 1/8/71 District Court holds electronic surveillance was constitutionally improper & order Government to disclose fully to defendant so hearing may be held to see if evidence at trial was tainted. – 30 day stay of order for government appeal.

*This Appendix omits reference to those cases concerning electronic surveillance for the sole purpose of gathering foreign security intelligence information. E.g., *United States v. Clay, United States v. Stone, United States v. O'Baugh, United States v. Ivanov & Butenko,* all discussed, *supra.*

APPENDIX A*

HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	APPEALS COURT REVIEW
Defendants moved prior to trial for disclosure of any electronic surveillance concerning them.	6/69 Attorney General Mitchell's affidavit: (1) Defendants participated in conversations overheard by taps used (a) to gather foreign intelligence information, or (b) to gather intelligence information concerning domestic organizations which seek to use force & other unlawful means to attack & subvert existing structure of government; (2) It would prejudice National interest to disclose particular facts concerning this surveillance other than to the Court in camera. Additional surveillances were revealed during and after trial.	Post Trial 2/26/70 (1) After examination of government's submission in camera & hearing oral arguments & briefs, District Court concluded such surveillance was lawful & therefore required no disclosure to defendants. (2) District Court further concludes that no constitutional rights of any defendants were infringed. (3) As to additional unlawful surveillance Court found trial evidence was not tainted by the unlawful act.	On Appeal Court of Appeals 7th Cir. to be argued in February 1972.
Defendant moved for disclosure.	8/6/70 Attorney General Mitchell's affidavit: (1) wiretaps were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert the existing structure of the government. (2) would prejudice national interest to disclose other than in camera.	9/1/70 District Court tapes were legally obtained as President may gather intelligence information having to do with matters vital to national security.	
On appeal of conviction to Court of Appeals Government disclosed to Court of Appeals that it had found that defendant had participated in conversations which were electronically monitored – remanded to District Court for proceedings required by *Alderman v. United States.*	– from Opinion of U.S.D.C. J. Ferguson (1/8/71) (1) Defendant overheard during gathering of information deemed necessary to (a) protect the nation from attempt of domestic organizations to use unlawful means to attack & subvert the existing structure of government. (2) Decision to initiate surveillance in this type of case must be based on wide variety of considerations & on many pieces of information which cannot readily be presented to a magistrate (Gov't brief at 8).	On 1/8/71 District Court holds electronic surveillance was constitutionally improper & order Government to disclose fully to defendant so hearing may be held to see if evidence at trial was tainted. – 30 day stay of order for government appeal.	On 6/22/71 Court of Appeals 9th Cir. ordered "submission of above case is vacated pending decision of Supreme Court in *United States v. Plamondon* (Keith). Now case is on Writ of certiorari to this Court *Ferguson v. United States, supra.*

ference to those cases concerning electronic surveillance for the sole purpose of intelligence information. E.g., *United States v. Clay, United States v. Stone, United States v. Ivanov & Butenko,* all discussed, *supra.*

CASE	HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE
4) *United States v. Sinclair, et al.*, U.S.D.C. ED Mich. 12/18/70 No. 44375	Defendants moved *interalia* for disclosure of certain electronic surveillance information prior to trial.	12/18/70 Attorney General Mitchell's affidavit: (1) Defendant has participated in conversations overheard by taps used (a) to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert existing structure of government. (2) It would prejudice national interest to disclose particular facts other than to the Court in camera.
5) *United States v. Hilliard* U.S.D.C ND Calif. 6/71 Case No. 69-141 Crim.	Defendant moved for discovery and suppression of electronic surveillance information prior to trial.	4/71 Attorney General Mitchell's affidavit: (1) opposed disclosure to defendant of his conversations overheard during course of National security surveillance of telephones. (2) These surveillances were authorized by Presidents through their Attorney Generals and were deemed necessary either (a) to protect against a clear and present danger to the security of the United States posed by organizations and individuals who seek to attack and subvert by violence and other unlawful means the existing structure of the Government or (b) to protect the Nation against actual or potential attack or (c) any other hostile action of a foreign power – the decisions to authorize were considered in conjunction with the entire range of foreign and domestic intelligence available to Executive branch. (3) I certify that it would be a practicable impossibility to submit to the Court all facts, circumstances upon which surveillance was based and further would prejudice National interest other than to the Court in camera.

WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	APPEALS COURT REVIEW
12/18/70 Attorney General Mitchell's affidavit: (1) Defendant has participated in conversations overheard by taps used (a) to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert existing structure of government. (2) It would prejudice national interest to disclose particular facts other than to the Court in camera.	1/25/71 District Court holds surveillance is illegal & orders government to disclose information sought. 48 hour stay for appeal	To United States Court of Appeals 6th Cir. on petition for writ of mandamus – On 4/8/71 Court denies government petition for writ of mandamus & holds that District Court properly found conversations of defendant were illegally intercepted & hence District Court disclosure order is not an abuse of judicial discretion. Order affirmed – 6/21/71 Cert. granted, U.S. Supreme Court.
4/71 Attorney General Mitchell's affidavit: (1) opposed disclosure to defendant of his conversations overheard during course of National security surveillance of telephones. (2) These surveillances were authorized by Presidents through their Attorney Generals and were deemed necessary either (a) to protect against a clear and present danger to the security of the United States posed by organizations and individuals who seek to attack and subvert by violence and other unlawful means the existing structure of the Government or (b) to protect the Nation against actual or potential attack or (c) any other hostile action of a foreign power – the decisions to authorize were considered in conjunction with the entire range of foreign and domestic intelligence available to Executive branch. (3) I certify that it would be a practicable impossibility to submit to the Court all facts, circumstances upon which surveillance was based and further would prejudice National interest other than to the Court in camera.		

CASE	HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	A
6) *United States v. Jaffe & Donghi* U.S.D.C. WD N.Y. 1/7/71 CR 1970-81	Defendant moved for discovery & inspection or records relating to electronic surveil- prior to trial.	1/7/71 Attorney General Mitchell's affidavit: Defendant has participated in conversations which were overheard (a) to gather intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of government. (2) it would prejudice the National interest to disclose other than to the Court in camera.	5/14/71 District Court finds surveillance constitutionally improper and orders government to disclose fully to defendant its surveillance records. – government granted stay of 15 days if failure to comply then judge will direct indictment to be dismissed.	
7) *United States v. Rudd, et al.*, U.S.D.C. ED Mich. 9/19/71 45119	Defendants moved for disclosure of electronic surveillance prior to trial.	9/19/71 Attorney General Mitchell's affidavit: (1) Electronic surveillances were authorized by President through Attorney General in exercise of his authority relating to the National security as set forth in 18 U.S.C. 2511 (3). My authorizations for such surveillances were in response to the requests of the Director of the FBI, which requests were considered in conjunction with all foreign and domestic intelligence available to the executive. (2) I certify that it would be a practicable impossibility to submit to the Court all the facts, circumstances upon which each authorization was based.–further it would prejudice to disclose other than to the Court in camera.	Pending	

HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	APPEALS COURT REVIEW
Defendant moved for discovery & inspection or records relating to electronic surveil- prior to trial.	1/7/71 Attorney General Mitchell's affidavit: Defendant has participated in conversations which were overheard (a) to gather intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of government. (2) it would prejudice the National interest to disclose other than to the Court in camera.	5/14/71 District Court finds surveillance constitutionally improper and orders government to disclose fully to defendant its surveillance records. – government granted stay of 15 days if failure to comply then judge will direct indictment to be dismissed.	7/8/71 United States Court of Appeals 2nd Cir. – As same important issue here as in (Keith) Cert. granted. Accordingly, petition for mandamus is denied without prejudice. The criminal proceeding (instant) will not be dismissed nor will disclosure of the sealed exhibits be required, nor will any further orders be entered by J. Curtin pending disposition by Supreme Court of the (Keith) case.
Defendants moved for disclosure of electronic surveillance prior to trial.	9/19/71 Attorney General Mitchell's affidavit: (1) Electronic surveillances were authorized by President through Attorney General in exercise of his authority relating to the National security as set forth in 18 U.S.C. 2511 (3). My authorizations for such surveillances were in response to the requests of the Director of the FBI, which requests were considered in conjunction with all foreign and domestic intelligence available to the executive. (2) I certify that it would be a practicable impossibility to submit to the Court all the facts, circumstances upon which each authorization was based.–further it would prejudice to disclose other than to the Court in camera.	Pending	

CASE	HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE
8) *United States v. Eqbal Ahmad, et al.*, U.S.D.C. MD Pa. 5/13/71 Crim. No. 14950	Defendants moved for disclosure of electronic surveillance prior to trial.	5/13/71 Attorney General Mitchell's affidavit: (1) The surveillance of the telephone was one authorized by President through Attorney General and was one deemed necessary to protect against a clear and present danger to the structure or existence of the United States – the decision to authorize such surveillance . . . was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive. (2) I certify it would be a practicable impossibility to submit to the Court all facts, circumstances upon which authorizations were based. Further it would prejudice the national interest to disclose other than to the Court in camera.
9) *United States v. Jaffe and Beiber* E.D. N.Y. June 18, 1971 No. 71 Crim. 480	On motion to disclose electronic surveillance prior to trial.	
10) *United States v. Hoffman*, D.D.C. November 23, 1971 No. 973-71	On motion to disclose	Government admitted surveillance but claimed it was legal since President has the power in matters involving foreign affairs, and domestic security situations and analogous.

WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	APPEALS COURT REVIEW
5/13/71 Attorney General Mitchell's affidavit: (1) The surveillance of the telephone was one authorized by President through Attorney General and was one deemed necessary to protect against a clear and present danger to the structure or existence of the United States – the decision to authorize such surveillance . . . was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive. (2) I certify it would be a practicable impossibility to submit to the Court all facts, circumstances upon which authorizations were based. Further it would prejudice the national interest to disclose other than to the Court in camera.	District Court on 11/12/71 suppressed as illegal the overheard conversations of defendants. The Court deferred until after trial the question of the possible taint of evidence from the illegally overheard conversations.	
	Trial judge ordered disclosure to the defendants for a determination of the question of legality of the surveillance.	Case resolved on other issue.
Government admitted surveillance but claimed it was legal since President has the power in matters involving foreign affairs, and domestic security situations and analogous.	Four of the five surveillances were of domestic organizations. The fifth concerned foreign intelligence activities. District Court required disclosure where surveillance was of a domestic character. Court recognizes foreign security surveillance is an open question and held that this single interception was legal. Determination of taint deferred until end of trial. District Court stayed its order on the motion of the Government until decision *in U.S.A. v. District Court* on December 8, 1971.	

CASE	HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	A
11) *United States v. Bacon* S.D.N.Y. 71 Criminal 687 Affidavit of October 1971 by Attorney General	Demand for disclosure prior to trial.	Attorney General Mitchell's affidavit: Said electronic surveillances were authorized by the President acting through Attorney General in exercise of his authority relating to national security as set forth in 18 U.S.C. 2511(3). Authorization to engage in surveillance was in response to a request from FBI considered in conjunction with all of the foreign and domestic intelligence information available to the Executive Branch of the Government.	Trial and disposition of issue stayed pending decision in *United States v. United States District Court.*	

HOW WAS ISSUE RAISED	WHAT WAS GOVERNMENT'S RESPONSE	DISTRICT COURT ACTION	APPEALS COURT REVIEW
Demand for disclosure prior to trial.	Attorney General Mitchell's affidavit. Said electronic surveillances were authorized by the President acting through Attorney General in exercise of his authority relating to national security as set forth in 18 U.S.C. 2511(3). Authorization to engage in surveillance was in response to a request from FBI considered in conjunction with all of the foreign and domestic intelligence information available to the Executive Branch of the Government.	Trial and disposition of issue stayed pending decision in *United States v. United States District Court.*	

APPENDIX B

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605 [1934]

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or

foreign communication by wire or radio and use the same or a
formation therein contained for his own benefit or for the b
of another not entitled thereto; and no person having received
intercepted communication or having become acquainted wit
contents, substance, purport, effect, or meaning of the same o
part thereof, knowing that such information was so obtained,
divulge or publish the existence, contents, substance, purport, e
or meaning of the same or any part thereof, or use the same o
information therein contained for his own benefit or for the be
of another not entitled thereto: *Provided*, That this section shall
apply to the receiving, divulging, publishing, or utilizing the
tents of any radio communication broadcast, or transmitted by
ateurs or others for the use of the general public, or relating to s
in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. § § 2510-20 [1968]

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the

exercise of the foregoing powers may be received in evidence in a trial hearing, or other proceeding only where such interception w reasonable, and shall not be otherwise used or disclosed except is necessary to implement that power.

§ 2515. Prohibition of use as evidence of intercepted wire o oral communications

Whenever any wire or oral communication has been intercepted no part of the contents of such communication and no evidenc derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department officer, agency, regulatory body, legislative committee, or othe authority of the United States, a State, or a political subdivisio thereof if the disclosure of that information would be in violatio of this chapter.

§ 2516. Authorization for interception of wire or oral co munications

(1) The Attorney General, or any Assistant Attorney Gene specially designated by the Attorney General, may authorize an a plication to a Federal judge of competent jurisdiction for, and su judge may grant in conformity with section 2518 of this chapter order authorizing or approving the interception of wire or oral co munications by the Federal Bureau of Investigation, or a Feder agency having responsibility for the investigation of the offense to which the application is made, when such interception may pro vide or has provided evidence of—

(a) any offense punishable by death or by imprisonment fo more than one year under sections 2274 through 2277 of titl 42 of the United States Code (relating to the enforcement of th Atomic Energy Act of 1954), or under the following chapter of this title: chapter 37 (relating to espionage), chapter 10 (relating to sabotage), chapter 115 (relating to treason), o chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 2 United States Code (dealing with restrictions on payments an loans to labor organizations), or any offense which involve murder, kidnapping, robbery, or extortion, and which is punish able under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without

an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. § 3504.

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.